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No.

In The

SUPREME COURT of the UNITED STATES

February Term, 1994

Dennis DiPinto and Kieran Cunningham

PETITIONERS,

vs

John Sperling, in his capacity of President of Lodge #8 of the Fraternal Order of Police, Steven Weaver, in his capacity as Chief of Police, Frank Edwards in his capacity as City Manager, Robert McKenna, in his capacity as Mayor, and Teresa Croutu, in her capacity as Personnel Director, all for the City of Newport, Rhode Island.

RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Dennis DiPinto, Pro Se
and Kieran Cunningham, Pro Se
P.O. Box 7072
Cumberland, RI 02864
Phone/Fax 401-333-6695

QUESTIONS PRESENTED

1. Whether this honorables Court's decision in **Steelworkers v. Rawson 495 US 362 (1990)** effectively overrules a prior decision by the Court of Appeals for the First Circuit, In **Kissinger v. U.S. Postal Service 801 F.2d 551 (1986)** by implying a Union can breach its duty of fair representation AND breach its contractual obligations as set forth in a collective bargaining agreement?

2. Whether the opinion of the Court of Appeals for the First Circuit erred in holding that "issue preclusion" as established by this honorable Court in **Migra v. Warren 465 US 75 (1984)** applies to the 29 USC 185 (a) claim of fair representation?

3. Whether the US Court of Appeals for the First Circuit erred in holding that "appellants now assert that the city violated their civil rights after the state court judgment was entered. As this claim was not presented below, we decline to consider it."?

4. What is the effect of issue preclusion (29 USC 1738) with regard to a 42 USC claim as it relates to the honorable Court's decision in **Board of Regents v. Roth 408 US 564 (1972)** - and - **Migra v. Warren 465 US 75 (1984)** as dissented against in prior decisions of the Supreme Court of New York in Lombard v. Board of Education 502 F. 2d 631 (1977)?

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reproduced in Appendix 6a. The opinion of the United States Court of Appeals for the First Circuit is reproduced in Appendix 2a

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 5, 1993. Appendix B: p. 2a. The order of the United States Court of Appeals for the First Circuit denying a petition for rehearing was entered on November 26, 1993. Jurisdiction of this Court is based on Rule 10.1 (a)(c) of the Rules of the Supreme Court.

STATUTES INVOLVED

29 USCS 185 PROVIDES:

A union's statutory duty of fair representation protects an individual from arbitrary abuses of the procedures for settlement of grievances by providing him with recourse against both his employer and the unions.

42 USCS 1983 PROVIDES:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivatio of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On June 26, 1989, Petitioners Dennis DiPinto and Kieran Cunningham were terminated as police officers of the City of Newport, RI. Each was issued a letter of termination containing several reasons

for discharge. None of the reasons was proven nor were the Petitioners offered an opportunity to dispute the contents therein.

Subsequent to the discharge, the first of several newspaper articles began to surface. The articles contained the damaging information contained in the letters of termination and further hearsay evidence surrounding the unsubstantiated charges. Additionally union support was requested by both Petitioners. During the employment by DiPinto and Cunningham, there were several instances that concerned allegations and discipline which required the assistance of union representation. Unfortunately, the union did not actively engage in any counsel or assistance notwithstanding the collective bargaining agreement (Append.)

On June 30, 1989 Petitioner DiPinto formally requested union assistance to recover his position as a Newport Police Officer. DiPinto had previously been a police officer in the Town of Hopkinton, RI for two years and previous to that a correctional officer for the State of Rhode Island and Auxiliary Police officer for the City of Newport. With no response in a timely manner, DiPinto retained a private attorney and filed a suit in RI Superior Court for injunctive relief and requesting a Rhode Island Law Enforcement Officer's Bill of Rights Hearing under Rhode Island General Law 42-28.6.

Petitioner Cunningham, also requested a union funded lawyer and was afforded one for his similar Superior Court action. He was denied union representation regarding his contested probation extension. The basis for approving Cunningham and

postponing DiPinto can be determined in Appendix K, Sperling Affidavit.

On December 13, 1989 DiPinto was informed that the union declined to assist him in his legal action with the city. On December 15, 1989, DiPinto lost his Superior Court action. On May 30, 1990, Cunningham lost his legal action with the city as well. He requested the union to provide him with assistance to the RI Supreme Court and was summarily refused. Cunningham retained a private attorney and subsequently lost at a show-cause hearing (RI Supreme Court) affirming the lower court's decision.

REASONS FOR GRANTING WRIT

I

WHETHER THIS HONORABLE COURT'S DECISION IN Steelworkers v. Rawson 495 US 362 (1990) EFFECTIVELY OVERRULES A PRIOR DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN Kissinger v. U.S. Postal Service 801 F. 2d 551 (1986) BY IMPLYING A UNION CAN BREACH ITS DUTY OF FAIR REPRESENTATION AND BREACH ITS CONTRACTUAL OBLIGATIONS AS SET FORTH IN A COLLECTIVE BARGAINING AGREEMENT?

The United States Court of Appeals for the First Circuit in its opinion in Kissinger v. U.S. Postal Service 801 F. 2d 551, 553 (1st Cir. 1986) has misapplied the rationale of Kissinger as it relates to the case at bar. Furthermore, Steelworkers does not imply the standard set forth in Kissinger as it relates to the case at bar. Hence the

Court of Appeals for the First Circuit has misapplied FRCP 56(c) and 28 USC 1738 in its affirmation of the district court summary judgment.

The US District Court for the District of Rhode Island defined the summary judgment as it related to the claim against the Union as: "a breach of the duty of fair representation, such as is alleged by the plaintiffs, is established upon a showing that the employee's action is meritorious and that arbitrary or bad faith conduct on the part of the Union in processing his grievance" has occurred. Plaintiffs can ultimately prevail against the Union, then, only by showing both that they were dismissed without just cause and that the Union acted arbitrarily or in bad faith. To resolve this matter it is unnecessary to reach the issue of the Union's good faith

because Plaintiff's claim against the City of Newport was plainly not meritorious....as probationary employees, Plaintiffs had no substantive claim for wrongful termination.

Regardless of any procedural rights which Plaintiffs make claim to, because their underlying substantive claim was invalid, the Union cannot be said to have breached their duty of fair representation."

The Petitioners disagree with this rationale. There are additional wrongs on the part of both Defendants. Conversely, both Vaca and especially Steelworkers do not limit fair representation to wrongful termination alone. We therefore accepted, and again accept, that a "labor union... may assume a responsibility towards employees by accepting a duty of care through a contractual agreement,

even if that contractual agreement is a collective bargaining contract to which only the union and the employer are signatories ....If an employee claims that a union owes him a more far reaching duty, he must be able to point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable against the union by individual employees."

495 U.S. 362(1990).

The First Circuit effectively precluded the Petitioners from presenting any issue(s) of material fact for judicial review. In summation, the First Circuit implemented three areas of review and application:

1. "Here, the Union duly interposed its collateral estoppel defense (issue preclusion) in response to Appellant's attempt to relitigate the merits of their unsuccessful claim to a termination hearing."

The Petitioners have maintained throughout the District Court, Circuit Court level, and before this honorable Court: 1) the issues presented for review against the Union are not a relitigation of the merits of the unsuccessful claim to a termination hearing and 2) these issues are not precluded under 28 USC 1738.

The Petitioners assert numerous violations that occurred during their employment with the City of Newport, at the time of their termination, and subsequent to the state court action(s).

It is the first two instances the Petitioners will address at this point.

The Respondent has maintained that Petitioners are precluded from asserting claims that have been or could have been presented in the initial state court action. A fair reading of the Petitioner's federal court action will clearly establish distinct and unlitigated issues as they relate to the Union which was not a party of the State Court action.

Secondly, does 28 USC 1738 preclude petitioners from arguing a 29 USC 185(a) claim?

2. "Since appellants are collaterally estopped from relitigating the merits of their underlying claims against the City-- an essential element of their unfair representation claim against the

union--the District Court correctly entered summary judgment in favor of the union."

Petitioners argue that this opinion is misapplied.

This honorable Court's opinion in Vaca v. Sipes 386 U.S. 171 sets the standard that a union breached its duty of fair representation when its conduct toward a member of the designated unit is arbitrary, discriminatory or in bad faith. Furthermore, "insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owen did here, sues the employer and the union in separate actions."

386 U.S. 171(1967)

Interestingly enough, the court in Vaca discusses a breach of duty by the union

and a breach of contract by the employer. In this instant action, the petitioners have maintained a dual violation by the union. Thus, Petitioners assert, notwithstanding a breach of contract by the employer, so too did the union fail to properly represent, thus a breach of its contractual obligation to the Petitioners. The standard applied in Kissinger sets forth a very crucial element. Just cause is now a requirement on the part of the injured union member to prove otherwise. This element, is now transferred to all aggrieved union members regardless of the specifics of their own collective bargaining agreement. Therefore, in addition to the standard in Vaca to prove the union breach of its duty of fair representation, even though the court distinguished damages among a union and

the employer, Kissinger adds a due process qualification in order to be entitled to the rights of a collective bargaining agreement. This standard is flawed and contrary to the contractual protections regardless of presumed just cause or the absence, thereof.

The circuit court of appeals for the first Circuit, prior to Kissinger, had implemented the "arbitrary and perfunctory" branch of Vaca by requiring unions to investigate grievances before refusing to process them. In Sarnelli v. Meat cutters local 33, 457 F2d 807 (1st Cir. 1972) plaintiff had been fired for "purloining" meat. Upon learning of the discharge, union representatives conducted a thorough investigation, interviewed witnesses, asked other union members about the witnesses veracity, and

consulted a lawyer about the changes of success in arbitration.

HEREIN lies the most crucial element for this honorable court to determine. What if the union, not only was arbitrary and perfunctory in its decision to arbitrate a members grievance by NEVER investigated a members assertion of wrongdoing on the part of the employer, NEVER represented the members during interrogation by the departments internal affairs division and NEVER provided adequate legal representation to the dues paying members of the union? The fiduciary, contractual, and legal obligations on the part of the union were negligently withheld from the Petitioners. Thus, the shadow cast by the preclusion standard poses a possible stalemate the Petitioners cannot recover from, who maintain that ALL of the

violations by the union could not have been litigated in the state court action.

The first problem this area presents is the jurisdictional basis for relief. Rhode Island General Law 28-7-45 specifically rules that police officers are exempt from the state labor relations act but rather are protected by "National Labor Relations Management Act". Furthermore, Savva v. Royal Industrial Union 138 A 2d 799 and 29 V.S.C.S. 141 n.49 clearly state: "State Court did not have jurisdiction of action by discharged employee against union, based upon negligence in that union failed to properly represent plaintiff following her discharge. Hence, did the RI court actually have jurisdiction in a matter against the union or are the issues preempted by Section 301 of the Labor

Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 V.S.C. 185(a) which states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The first circuit has concluded that the Petitioners are precluded from arguing any issue that could have been raised in the prior state court action against the City. However, does this correlate to the issues against the union? If, as in Vaca and Steelworkers Supra, the

Petitioners have both dual and separate claims to argue, where is the line drawn?

Accordingly, Kent County Bd. of Education v. Bilbrough 525 A2d 232 (1987) p. 238 introduces the transactional analysis as it presumably relates to the case at bar. "[3] Looking at the facts of Bilbrough's two actions from a transactional point of view, one basically concerned his discharge while the other basically involved an alleged invasion of police files... they are separate transactions. The transactional approach to preclusion in this case does not alter the result produced by an analysis which would look to the theory of liability or to the required evidence."

Petitioners present claims that stand independently of the discharge action and

may be conveniently treated as a separate trial unit.

Furthermore, this honorable courts decision in Steelworkers v. Rawson 495 us 362 (1990) may provide Petitioners with an additional argument regarding specific areas (additionally) the union breached as outlined in the collective bargaining agreement. "We therefore accepted, and again accept, that a labor union ...may assume a responsibility towards employees by accepting a duty of care through a contractual agreement, id at 860, even if that contractual agreement is a collective bargaining contract to which only the union and the employer are signatories."

Clearly, because of the unique nature of law enforcement with para-military rules and regulations, a police union has an obligation unlike any other union.

The law enforcement officers face a constant dilemma of complaints by civilians, city officials and superior officers. The need to be informed and represented is essential from the daily exposure to litigation and internal affairs investigation(s). Therefore, the union representation takes on a special and critical function as an intermediary between the officer and management. Article 14 of the Collective bargaining agreement states in part: b) "interrogation or hearing upon departmental charges shall be conducted pursuant to the disciplinary sections of the classified civil service merit ordinance of the City of Newport, as amended, and pursuant to the rules and regulations of the Newport Police Department". Article 17 continues with the provisions of the grievance and

arbitration procedure b) Step 1: "the policeman or policemen involved with or without a lodge No. 8 Representative..."

Consequently, the union never assisted, informed or represented the Petitioners during numerous investigations and interrogations. The Petitioners were disciplined without the ability to grieve. Although the Petitioners attempted to argue on their own behalf, via letters and personal requests, the union, although solicited, never assisted the Petitioners. As a matter of fact, upon termination of the Petitioners, the union provided a lawyer to file an injunctive relief suit on behalf of Cunningham, and although in a written request by DiPinto four days after his termination for union representation, he was delayed until one day before his

superior court decision that the union declined his request.

II

WHETHER THE OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN HOLDING THAT "ISSUE PRECLUSION" AS ESTABLISHED BY THIS HONORABLE COURT IN MIGRA V. WARREN 465 US 75 (1984) APPLIES TO THE 29 USC 185(A) CLAIM OF FAIR REPRESENTATION.

Simply stated, the Fraternal Order of Police Lodge #8 could not have been a party in the state court action. Notwithstanding Savva v. Royal Industrial Union 138 A2d 799 and 29 USC 185 n.395 as supported by Petitioners earlier in this brief. Migra sets forth the standard of issues not only raised by issues that could have been raised did not raise in

the earlier state court action. The union did not protect or inform the Petitioners during the developments of their ultimate dismissal and subsequent defamation of their reputation precluding future employment similar to this courts standard in Board of Regants v. Roth 408 us 564. While the Petitioners, leading up to and including their dismissal, did not want to alienate the only possible means of support only the union could provide. While the city violated, among other things, the provisions of the collective bargaining contract, so too, did the union arbitrarily withhold advocacy usually provided to all union members by contract provision and normal operating procedures, until both Petitioners lost their claim for a state Law Enforcement Officers Bill of Rights Hearing. The union, after months of

delay in informing Petitioner DiPinto of its intentions not to represent, and a half-hearted attempt to represent Petitioner Cunningham thru an attorney with a clear conflict of interest [as determined by US District Court] left both Petitioners at the point this honorable court now examines.

Finally, the assertion of the circuit court 3. "Insofar as their complaint may attempt to plead claims not dependent on precluded grounds, appellants failed to come forward with specific evidence, or authority, sufficient to demonstrate that the union is not entitled to judgement as a matter of law."

Conversely, Petitioners herein maintain that they have presented issues and authority sufficient to demonstrate, clearly, the union is not entitled to judgement as a matter of law. The

Petitioners bring this courts attention to New Jersey Deposit v. Glouster Environmental Management 800 f.Supp. 1210 "In deciding whether there is a disputed issue of material fact the court must resolve any inferences and reasonable doubts in favor of the non moving party." The Petitioners argue that claims WERE presented in the RI District Court and further expounded upon to the First Circuit Court. Clearly the Circuit Court recognized these infractions and violations, as cited in footnote #3 of the November 5, 1993 decision. Clearly, the Petitioners third amended complaint: Count III, No. 30 related to the bad faith on the part of the union and further expounded in memoranda submitted to the district court and circuit court. The Fraternal Order of Police, Lodge #8 was in direct conflict with its own

agenda as it correlated to the rights and responsibilities outlined in the collective bargaining contract. The union stood as a silent partner while the city carefully calculated its unfounded acquisitions against the Petitioners. Furthermore, the union divided the two employees by choosing to represent one, while not representing the other. In addition, the union procrastinated its decision not to afford DiPinto representation until one day before his superior court decision. The union then abandoned Cunningham when he had significant case law substantiating his rights under the contract under RI law (as well as DiPinto) Romano v. Mancini 122 RI 746. As the RI Supreme Court has established, regardless of status, "If one of the parties refuses to submit to the agreed upon procedure for resolving

contractual disputes, opposing party may sue for enforcement of the contract. [R.I. General Law 28-8-2]. Although the contract is deficient in a procedure for violations on the part of the union, it clearly established a fair representation clause afforded to all employees.

The Texas Law Review (1973) presents a theoretical structure with regard to the duty of fair representation. The dilemma presented to the Petitioners is twofold. First, they cannot logically join the union in an action against the city for wrongful discharge because of the factors enumerated above. Secondly, once the union's actions (or inactions) became ripe, the state court proceeding had already taken its course. This is truly a unique test of not only issue preclusion v. ongoing harm, but the limits of a contract as it affects

discharged employees and union members at the mercy of their union representatives for direction and representation.

Certainly, this honorable court can determine from the record that there is no legitimate legal reason why the Petitioners are precluded from pursuing an action against the union. They (the union) were not a party in the prior state court action, the majority of issues were not ripe at the time of the state court action, and the issues against the union are in no way dependent on the issues against the city. Therefore, it would be unjust to prevent the union from answering to the serious charges brought against them.

III

WHETHER THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN HOLDING THAT "APPELLANTS NOW ASSERT THAT THE CITY VIOLATED THEIR CIVIL RIGHTS AFTER THE STATE COURT JUDGMENT WAS ENTERED. AS THIS CLAIM WAS NOT PRESENTED BELOW, WE DECLINE TO CONSIDER IT."

The appellants again bring this courts attention to the fact that claims were presented to the district court and overlooked by the circuit court. In a hearing before Judge Boudewyns on December 12, 1992, and subsequent memoranda submitted on December 29 1992 clearly asserted continued defamation and slander of their name and reputation by the defendants. These issues are referred to in the appellants verified 3rd amended complaint under Count I No. 18, Count II No. 23 and Count III No. 30.

Additionally, to further present the ongoing harm of the appellants good name, reputation and honor an editorial dated December 23, 1992 was included in memoranda to Judge Boudwyns titled, "Fired Officers got the justice they deserved." (Newport Daily News)

DeCosta v. Viacom Int. 758 F.Supp 807 (1991) (US District Court D. Rhode Island) clearly states "res judicata does not bar plaintiff from seeking redress for postjudgement acts even though similar injuries and/or legal theories are asserted in both suits."

IV

WHAT IS THE EFFECT OF ISSUE PRECLUSION (28 U.S.C. 1738) WITH REGARD TO A 42 U.S.C. 1983 CLAIM AS IT RELATES TO THIS HONORABLE COURTS DECISION IN BOARD OF REGANTS V. ROTH 408 U.S. 564 (1972) - and - MIGRA V. WARREN 495 US 75 (1984) AS PRESENTED IN PRIOR DECISIONS OF THE SUPREME COURT OF NEW YORK?

As is recognized in this honorable courts decision in Migra id p.83 (6) "Most federal courts have faced this question have ruled that claim preclusion is applicable to a 1983 action. SOME APPEAR TO HAVE DECIDED OTHERWISE. See Lombard v. Board of Ed. of City of New York. 502 F 2d 631 (1974). and Kutscher's Country Club 493 N.Y.S. 2d 829 (1985).

The question confronting the appellants raises a very interesting dilemma. If

the 1st Circuit is correct in their assertion that issue preclusion prevents the appellants from raising the name clearing hearing claim, the messages is essential the appellants should have asked in the prior court action both a request for full due process - property right claim, simultaneously with a lesser - liberty right claim. The appellants were to include both claims, would that not be illogical? Clearly it is established that probationary employees have no property right in their employment. Thus, if the appellants were attempting to assert that they had a property right and requested a status determination under Rhode Island Law, what would preclude them from filing a liberty right suit upon the public disclosure of wrongdoing both before and AFTER the state court action. In **Roth**,

the court held that "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury..." Thus, the appellants continue to be harmed with the unproven allegations in the letters of termination, continued newspaper articles, and the presence of a personal file that to this day closes the door on future municipal employment for the appellants.

If issue preclusion prevents the appellants from alleging this very cause, to what extent is issue preclusion ruling? Does the harm and violations incurred by the appellants outweigh the preclusion effect, or the continued harm begin where the prior suit ended?

Hence, if the appellants are prevented from introducing 1983 violations that arguably could have been included in the

prior suit, can the present issue of ongoing harm be asserted now? The merits of this case, which have NEVER been addressed, continue to follow the appellants casting a dark cloud on their ability to earn a living. Is this what the courts had in mind with the evolution of the preclusionary rule? If the appellants are prevented from employment as a police officer, today, as a result of damaging and unproven material furnished by the city, is that a new claim or issue preclusion? When the newspaper published material damaging to the reputations of the appellants is this ripe for litigation or claim preclusion? In fact, as is the defendant City, they have a specific provision in their ordinances much like the standard of Roth. Thus, if the appellants choose to argue their status as permanent status

entitled, is it not the obligation of the City to afford the least amount of protection when they attach a stigma such as with the appellants? Furthermore, is it necessary to ask for this basic protection when it is afforded to every employee, regardless of status? In Roth, the court determined that the State did not make any charge against him that might seriously damage his standing and associations in his community. "Had it done so this would be a different case."

The Petitioners assert that they did not waive their Constitutional rights in the first suit.

CONCLUSION

The Petitioners have presented to this honorable court several very important and consequential issues. The evolution of issue and claim preclusion has gone

from the base of a pyramid at the apex presented in Migra. The delicate balance of successive litigation must be weighed with the integrity and Constitutional Rights that tip the scale in favor of justice. As the opinion better a guilty man go free than an innocent man be convicted, the Petitioners urge this court to protect the Rights that outweigh the need for judical brevity.

Finally, this court must recognize the legal illusion manifested by the union in their attempt to follow the defenses presented by the city. The Petitioners are certain that his Supreme Court will see through the maze of legal maneuvering and acknowledge the Right to seek relief from the defendants. It is essential that a plaintiffs right to litigate does not fall short due to the countless amount of frivolous lawsuits the judical

system is forced to bare. The only fair way to prevent hornbook law from summarily waiving a legitimate issue of material fact is a careful examination of each individual case and the equally important Right to have those issues heard. Whether an issue could have been raised is the most enigmatic burden a plaintiff could possible bear. Although reasonable diligence is necessary to foster judical integrity, unreasonable expectations to hypothetical possibilities is too much for any mortal to bear.

The law is a noble pursuit of the Practice of judical equality and standards. These standards, if not reflective of the essence of decency vs. the need for discipline will turn our courts into a computer like entity, void of the temperance of the human element

the law provides. It would be of little consequence to acknowledge a plaintiff has valid issues for argument by is prevented from presentation because his attorney should have raised every possible variable in one single action. Is that what this honorable Court has in mind with the issue preclusion rule?

Respectfully submitted,

_____

Denis DiPinto and Kieran Cunningham,
Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1671

DENNIS DIPINTO, AND
KIERAN CUNNINGHAN,
Plaintiffs, Appellants,

v.

JOHN SPERLING, IN HIS CAPACITY OF
PRESIDENT OF LODGE #8 OF THE FRATERNAL
ORDER OF POLICE, AND THE CITY OF NEWPORT,
EL AL.,
Defendants, Appellees.

ORDER OF COURT
Entered November 26, 1993

Upon consideration of appellants' petition for rehearing, it is ordered that the petition for rehearing is denied.

By the Court:

_____CLERK.

(Messrs. McBurney, Nicholson & Woodbine)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1671

DENNIS DIPINTO, AND
KIERAN CUNNINGHAN,
Plaintiffs, Appellants,

v.

JOHN SPERLING, IN HIS CAPACITY AS PRESIDENT OF LODGE #8 OF THE FRATERNAL ORDER OF POLICE, AND THE CITY OF NEWPORT, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND [Hon.Ernest C. Torres, U.S.District Judge]

Before
Breyer, Chief Judge,
Rosenn, * Senior Circuit Judge,

and Cyr, Circuit Judge.

Kevin B. McBurney with whom DiPinto Associates was on brief for appellants.
Joseph J. Nicholson, Jr. for appellee, City of Newport.
Donald A. Woodbine with whom Vogel, Souls & Woodbine was on brief for Lodge #8 of the Fraternal Order of Police.

November 5, 1993

* Of the Third Circuit, sitting by designation.

APPENDIX B

CYR, Circuit Judge. Appellants, former probationary police officers with the City of Newport, Rhode Island, were summarily terminated in June, 1989. They then filed separate state court suits against the City of Newport and certain City officials [collectively: the "City"], claiming deprivations of their alleged entitlement to a hearing under Rhode Island law. The state court dismissed their claims, with prejudice,[1] on the ground that Rhode Island law affords probationary police officers no right to a termination hearing.

Appellants then brought this action in the United States District Court for the District of Rhode Island for alleged violations of the collective bargaining

---

1 The Rhode Island Supreme Court likewise upheld plaintiff Cunningham's termination. DiPinto did not appeal.

agreement and their civil rights, see 42 U.S.C. § 1983, arising from the City's failure to afford them a termination hearing. Their complaint also asserted claims against the Fraternal Order of Police Lodge #8 [the "Union"] for breach of its duty of fair representation. The district court adopted the recommended decision of a majistrate judge, and entered summary judgment against appellants. We affirm.

I. **Claims Against the City.**

Federal courts must accord a state court judgment the same preclusive effect it would receive in the state where it was rendered. Allen v. McCurry, 449 U.S. 90, 96 (1980) (§ 1983 Under the Rhode Island doctrine of res judicata (claim preclusion), a final judgment on the merits precludes later litigation of the same claim by the same parties.

APPENDIX B

Coates v. Coleman, 51 A.2d 81, 85 (R.I. 1947). See Capraro v. Tilcon Gammino, Inc., 751 F.2d 56, 58 (1st Cir. 1985) (per curiam). A dismissal, with prejudice, constitutes a final judgment on the merits. School Comm. of North Providence v. North Providence Federation of Teachers 404 A.2d 493, 495 (R.I. 1979). As the City was a part to the state court actions, we need only consider whether appellants had a full and fair opportunity to litigate their claims against the City in state court; indeed, they admittedly chose, for strategic reasons, not to raise "the current ... issues." Consequently, their claims against the City are res judicata.[2]

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2 Appellants now assert that the City violated their civil rights afte the state court judgements were entered. As this claim was not presented below, we decline to consider it. Nieves v. University of Puerto Rico, ____F.3d____, ____ (1st Cir. 1993),

APPENDIX B

II. Claims Against The Union.

A claim for breach of a Union's duty of fair representation cannot succeed absent a showing, inter alia, that the underlying action against the employer was meritorious. Kissinger v. U.S. Postal Service, 801 F.2d 551, 553 (1st Cir. 1986). Cf. Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 (1976). Here, the Union duly interposed its collateral estoppel defense (issue preclusion) in response to appellants' present attempt to relitigate the merits of their unsuccessful claims to a termination hearing. Mutuality of parties is not essential to a collateral estoppel defense under Rhode Islnd law. Providence Teachers Union, etc. v. McGovern, 319 A.2d 358, 361 (R.I. 1974).

No. 92-2214, slip op. at 23, n.19 (1st Cir. Oct. 18, 1993).

APPENDIX B

Since appellants are collaterally estopped from relitigating the merits of their underlying claims against the City -- an essential element of their unfair representation claims against the Union -- the district court correctly entered summary judgment in favor of the Union. See Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993).[3] The district court judgments in favor of the appellees must be affirmed. Affirmed.

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[3] Insofar as their complaint may attempt to plead claims not dependent on precluded grounds, appellants failed to come forward with specific evidence, or authority, sufficient to demonstrate that the Union is not entitled to judgement as a matter of law. Id.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JUDGMENT IN A CIVIL CASE

Dennis DiPinto
Kieran Cunningham

V. CIVIL ACTION NO. 92-0068T

Frank Edwards, et als

DECISION OF THE COURT:

IT IS ORDERED AND ADJUDGED:

Judgement for the Defendants, Frank Edward, John Sperling and Steven Weaver.

Pursuant to order dated March 9, 1993 and May 18, 1993 regarding notions for summary judgement.

DATE: May 25, 1993

_____

JAMES E. WEBB/PAULA A. BROWN

DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM

V. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police;

O R D E R

The Report and Recommendation of the United States Magistrate Judge Timothy M. Boudewyns filed on April 19, 1993, is accepted pursuant to Title 28, United States Code, Section 636(b) (1) (B).

The motion of defendent John Sperling for summary judgment is granted.

By Order,

_____

Deputy Clerk

ENTER:

_____
Ernest C. Torres
United States District Judge
Date:_____
cc: Magistrate Judge Boudewyns

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

V. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police; FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity Chief of Police of the City of Newport; ROBERT MCKENNA, in his capacity as Mayor of the City of Newport; and TERESA CROTEAU, in her previous capcity as personnel director for the City of Newport.
Defendants

O R D E R

That portion of the Magistrate's Report and Recommendation dated December 18, 1992 recommending that Defendants Frank Edward's and Steven Weaver's Motion for Summary Judgment be granted as accepted.

However, that portion of the Magistrate's Report and Recommendation recommending that Defendant Sperling's

APPENDIX E

recommending that Defendant Sperling's Motion to Dismiss for lack of subject matter jurisdiction be granted is rejected because this Court has subject matter jurisdiction under 29 U.S.C. 185(a) (1975).

Accordingly, the case is recommitted to the Magistrate for a further Report and Recommendation with respect to Defendant Sperling's Motion for Summary Judgment. In his Report and Recommendation, the Magistrate should include a discussionof whether Plaintiff will be able to satisfy the elements of a breach of fair representation claim as set forth in Vaca v. Sipes, 386 U.S. 171, 193 (1967) and United States v. Kissinger, 801 F.2d 551, 553 (1st Cir. 1986). The Magistrate may request additional memoranda from counsel addressing the issue of whether, under

APPENDIX E

the doctrines of collateral estoppel or res judicata, the prior state court judgment precludes this Court from finding that Plaintiff has a meritorious claim, as is required under Sipes and Kissinger.

By Order,

-

_____

Deputy Clerk

ENTER:

_____

Ernest C. Torres

United States District Judge

Date:_____

cc: Magistrate Judge Boudewyns

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

V. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police,
Defendant

REPORT AND RECOMMENDATION

Timothy M. Boudewyns, United States Magistrate Judge

This matter is before the Court for judicial review of the defendant's, John Sperling, in his capacity as President of Lodge #8 of the Fraternal Order of Police ("Sperling" or the "Union"), motion pursuant to Federal Rule of Civil Procedure ("FRCP) 56 for summary judgment. This matter has been referred to me for preliminary review, findings

and recommended disposition.[1] The defendant argues that he is entitled to summary judgment because there are no material facts in dispute and he is entitled to judgment as a matter of law. I believe that he is correct and that judgment should be granted for the defendant.

Procedural history

The relevant procedural history was fully developed in my previous Report on this case, dated December 18, 1992. That Report recommended that all of the other defendants in this case be granted summary judgment on the grounds of res judicata. That Report was accepted by the Court's Order of March 8, 1993. In addition, that Order directed me to consider Sperling's motion for summary

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[1] 28 U.S.C. § 636(b) (1) (B): Mathews V. Weber, 423 U.S. 261 (1976).

APPENDIX F

judgment in light of the holdings of Vaca V. Sipes[2] and Kissinger V. United States Postal Service.[3] Counsel were directed to review these cases, and were allowed argument on the matter at a hearing on April 6, 1993. No additional briefs have been submitted.

Issue

Is there any possibility, on the undisputed facts of this case, that plaintiffs can establish a prima facie case on their breach of fair representation claim against Sperling?

Facts of the Case

Plaintiffs were both members of the Newport Police Department. They were both terminated from the Newport Police Department on June 26, 1989. DiPinto

---

2 386 U.S. 171 (1967)

3 801 F.2d 551 (1st Cir. 1986)

filed a complaint under 42 U.S.C. § 1983 regarding his termination, in Newport Superior Court against Edwards, Weaver, and Captain Joseph Subin, in his capacity as acting Chief of the Newport Police Department.[4] Cunningham filed a complaint under 42 U.S.C., § 1983 regarding his termination, in Newport County Superior Court against Edwards, Weaver, and the City of Newport[5]. DiPinto received a trial on the merits of his case, with judgment being entered on December 22, 1989, dismissing his action with prejudice. DiPinto did not appeal. Cunningham received a trial on the merits of his case, with judgment being rendered on May 4, 1990, dismissing his action

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4 C.A. No. NC 89-0327

5 C.A. No. NC 89-0410

with prejudice.[6] Cunningham appealed to the Supreme Court of Rhode Island. On October 18, 1991, an order was entered by the Supreme Court dismissing Cunningham's appeal. Neither plaintiff was represented by the Union during the course of these trials.

At the state court level the plaintiffs asserted that they were entitled to a hearing before termination because they were "permanent police officers." After full trials for both, and an appeal to the R.I. Supreme Court in Cunningham's case, their position was

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6 A copy of Justice Israel's decision in this case was attached for reference to my previous Report. The facts and allegations of Cunningham's case are more fully detailed in that decision. While no written decision was issued by Justice Israel in the DiPinto case, I reviewed the transcript of his bench decision.

rejected.[7] "Newport City Charter" rights under the City of Newport Ordinance, and rights under the union collective bargaining agreement have been breached because of the City of Newport's actions in terminating them from employment. In addition, plaintiffs

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[7] The Supreme Court of Rhode Island's Order states:

> This matter was before the Supreme Court pursuant to an order issued to both parties to appear and show cause why the issues raised in this appeal should not be summarily decided. In this case the plaintiff had appealed from the trial justice's denial of his complaint. The principle issue raised by this appeal is whether the plaintiff ever achieved status as a permanent employee in the police department of the city of Newport.
>
> After reviewing the memoranda submitted by the parties and after hearing counsel in oral argument, it is the conclusion of this court that cause has not been shown. The court is of the opinion that the trial justice ruled correctly that the plaintiff had not attained permanent status and therefore could be properly terminated without a hearing.
>
> Therefore, the plaintiff's appeal is denied and dismissed, the judgment appealed from is affirmed and the papers of the case are remaned to the Superior Court.

claim that Sperling and his Union "failed to act responsibly to vindicate the rights of the Plaintiffs ... [which] constitutes a breach of the duty of fair representation under the collective bargaining agreement and a violation of 29 U.S.C.S. 185(a)."[8]

Discussion

Defendant's motion for summary judgment is made pursuant to FRCP 56(c), which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers or interrogatories, and admissions of file, together with the affidavits,

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8 This language is contained in plaintiffs third amended complaint at paragraph 30. Plaintiffs' motion to amend the second amended complaint was granted only with regards to defendant Sperling. Even with the "clarification," however, the complaint remains legally deficient.

> if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate then when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law."[9]

Once the movant avers "an absence of evidence to support the non-moving party's case,"[10] the latter must adduce specific facts establishing the existence of at lease one issue that is both "genuine" and "material." The mere existence of a factual dispute, of course, is not enough to defeat summary

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9 FRCP 56(c)

10 Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

judgment. The evidence relied upon must be "significantly probative" of specific facts,[11] and "material" in the sense that the dispute over them necessarily "affect(s) the outcome of the suit."[12] In other words, the party opposing summary judgment must demonstrate that there are bona fide factual issues which "need to be resolved before the related legal issues can be decided."[13] The First Circuit has concluded that an issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[14]

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11 Anderson v. Liberty Lobby, Inc. 477 U.S. 242, at 249-50 (1986).

12 Id. at 248

13 Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179 181 (1st Cir. 1989)

14 Oliver V. Digital Equip. Corp.,, 846 F.2d 103, 105 (1st Cir. 1988) (quoting Anderson, supra, 477 U.S. at 248).

APPENDIX F

The court's function in ruling on a notion for summary judgment is to determine whether or not such a genuine issue exists, and not to resolve such existing factual issues.[15]

A breach of the duty of fair representation, such as is alleged by the plaintiffs, is established upon a showing that the employee's action is meritorious and that "arbitrary or bad-faith conduct on the part of the Union in processing his grievance" has occurred.[16] Plaintiffs can ultimately prevail against the Union, then, only by showing both

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15 United States V. Diebold, Inc. 369 U.S. 654, 82 S.Ct 993 (1962), Adicks V. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970), Anderson, supra at 248; Local No. 48, United Brotherhood of Carpenters and joiners V. United Brotherhood of Carpenters Joiners, 920 F.2d 1047, 1050 (1st Cir. 1990); Garside V. Osco Drug, Inc., 895 F.2d 46,48 (1st Cir. 1990)

16 Vaca, supra. at 193, 87 S.Ct. at 918

APPENDIX F

that they were dismissed without just cause and that the Union acted arbitrarily or in bad faith."[17]

To resolve this matter is unnecessary to reach the issue of the Union's good faith because plaintiff's claim against the City of Newport was plainly not meritorious. The Rhode Island Superior Court has ruled that the plaintiffs were "probationary" employees "who could have been fired without application of the L.E.O. [Law Enforcement Officer] Bill of Rights or the collective bargaining agreement between the City and the Fraternal Order

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17 Kissinger, supra. See also, Voccio V. General Signal Corp. 732 F. Supp. 792 (D.R.I. 1990).

of Police."[18] As probationary employees, plaintiffs had no substantive claim for wrongful termination. Regardless of any procedural rights which plaintiffs make claim to, because their underlying substantive claim was invalid, the Union cannot be said to have breached their duty of fair representation.

Conclusion

The facts of this case have already been decided by the Superior Court. The relevant case law, when applied to those facts, is dispositive of this matter in favor of the defendant. Summary judgment should entered for the defendant.

Any objection to this Report and Recommendation must be specific and must

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18 Justice isreal's opinion in Cunningham V. Edwards, at page 3. This opinion was attached, in its entirety, to my previous Report and Recommendation in this case.

APPENDIX F

be filed with the Clerk of the Court within ten (10) days of its receipt.[19] Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the district court."[20]

Timothy M. Boudewyns

United States Magistrate Judge

April 19, 1993

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19 Rule 32, Local Rules of court; Rule 72(b), FRCP.

20 Park Motor Mart, Inc. V. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States V. Valencia-Copete, 792 F.2d 4 (1st cir. 1986).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM,

VS. CA 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport, STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport,: Rhode Island, ROBERT MCKENNA, in his capacity as Mayor of the City of Newport; and TERESA CROTEAU,: in her previous capacity as personnel director for the City of Newport.

REPORT AND RECOMMENDATION

Timothy M. Boudewyns, United States Magistrate Judge

This matter is before the Court for judicial review of the defendant's, Frank Edwards, in his capacity as City Manager of the City of Newport ("Edwards") and Steven D. Weaver, in his capacity as Chief of Police of the City of Newport, Rhode Island ("Weaver") motions pursuant to Federal Rule of Civil Procedure (FRCP)

APPENDIX G

56 for summary judgment and defendant John Sperling's, in his capacity as President of Lodge #8 of the Fraternal Order of Police ("Sperling"), motion to dismiss for lack of subject matter jurisdiction pursuant to FRCP 12(B) (1) or for summary judgment.[1]

This matter has been referred to me for preliminary review, findings and recommended disposition.[2] The defendents argue that they are entitled to summary judgment as a matter of law. I believe that they are correct, that the doctrine of res judicata bars this

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1 The claim against Sperling for his failure to fairly represent the plaintiffs is based on state law and should be dismissed, if these report and recommendation is accepted, since it is no longer pendant to any federal claims. United Mine Workers V. Gibbs, 383 U.S. 715, 86 S.CT. 1130 (1966).

2 28 U.S.C. § 636 (b) (1) (B); Mathews V. Weber, 423 U.S. 261 (1976).

APPENDIX G

action, and that judgment should be granted for the defendants.

Procedural history

Plaintiffs allege here that their "liberty rights" under the "Newport City Charter", certain rights under a City of Newport ordinance, and certain rights under the union collective bargaining agreement have been breached because of the City of Newport's actions in terminating them from employment. Plaintiffs litigate here claims that were previously raised or could have been raised in Newport County Superior Court.

The complaint in this Court alleges that plaintiffs were "terminated from the City of Newport Police Department in volition of their "liberty rights as municipal employees as guaranteed under the Fourteenth Amendment of the Constitution, the collective bargaining

APPENDIX G

agreement of the union contract, along with the administrative covenents and ordinances of the City of Newport." Plaintiffs further allege that they were dismissed from their positions as City of Newport Police officers without notice and that the reasons for termination were unsubstantiated and misleading.

Issue

Does res judicata bar this cause of action?

Facts of the case

Plaintiffs were both members of the Newport Police Department. DiPinto and Cunningham were terminated from the Newport Police Department on June 26, 1989. DiPinto filed a complaint under 42 U.S.C. * 1983 regarding his termination, in Newport County Superior Court against Edwards, Weaver, and Captain Joseph Subin, in his capacity as acting Chief of

APPENDIX G

the Newport Police Department.[3] Cunningham filed a complaint under 42 U.S.C. * 1983 regarding his termination, in Newport County Superior Court against Edwards, Weaver, and the City of Newport.[4] DiPinto received a trial on the merits of his case, with judgment being entered on December 22, 1989, dismissing his action with prejudice. DiPinto did not appeal. Cunningham received a trial on the merits of his case, with judgment being rendered on May 4, 1990, dismissing his action with prejudice.[5] Cunningham appealed to the

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3 C.A. No. NC 89-0327

4 C.A. No. NC 89-0410

5 A copy of Justice Isreal's decision in this case is attached for reference. The facts and allegations of Cunningham's case are more fully detailed in the decision. While no written decision was issued by Justice Isreal in the DiPinto case, I have reviewed the transcript of his bench decision.

APPENDIX G

Supreme Court of Rhode Island. On October 18, 1991, an order was entered by the Supreme Court dismissing Cunningham's appeal.

At the state court level the plaintiffs asserted that they were entitled to a hearing before termination because they were "permanent police officers." After full trials for both, and an appeal to the R.I. Supreme Court in Cunningham's case, their position was rejected.[6] Both officers now seek

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[6] The Supreme Court of Rhode Island's Order states:

> This matter was before the Supreme Court pursuant to an order issued to both parties to appear and show cause why the issues raised in this appeal should not be summarily decided. In this case the plaintiff had appealed from the trial justic's denial of his complaint. The principle issue raised by this appeal is whether the plaintiff ever achieved status as a permanent employee in the police department of the city of Newport.
>
> After reviewing the memoranda submitted by the parties and after hearing counsel in oral argument, it

APPENDIX G

reinstatement to their jobs becuse they allege they were denied their rights as "probationary employees" to the procedural safeguards guaranteed by a city ordinance.[7]

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is the conclusion of this court that cause has not been shown. The court is of the opinion that the trial justice ruled correctly that the plaintiff had not attained permanent status and therefore, could be properly terminated without a hearing.

Therefoer, the plaintiff's appeal is denied and dismissed, the judgement appealed from is affermed and the papers of the case are remanded to the Superior Court.

[7] According to the plaintiffs they are not seeking redress in this Court for the same injury alleged in State Court:

> The injury suffered by the plaintiffs in the Superior Court action was that they (Plaintiffs), as permanent status police officers were terminated from employment by the City of Newport in violation of the policemans Bill of Rights and that the City of Newport should be refrained from doing so.
>
> The "injury" suffered by the plaintiffs in this Federal Court Action is that they, as probationary status employees of the City of Newport, were deprived of their Liberty interests, requirements,

APPENDIX G

Discussion

Defendant's motion for summary judgment is made pursuant to FRCP 56(c), which states:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers or interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate then when "there is no genuine issue as to any

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> safeguards or guarantees that were set forth by section 288.05 of the City of Newport ordinances, and by which the City of Newport was obligated to follow before the Plaintiffs could be terminated or dismissed from their employment. (From plaintiffs' brief in opposition to these motions.)

The point missed by plaintiffs -- and one which is fatal to their case -- is that they should have pursued both claims in the Superior Court at one time. See this Roports discussion of res judicata, infra.

APPENDIX G

material fact and ... the moving part is entitled to judgment as a matter of law."[8] Once the movant avers "an absence of evidence to support the non-moving party's case,[9] the latter must adduce specifc facts establishing the existence of at least one issue that is both "genuine" and "material." The mere existence of a factual dispute, of course, is not enough to defeat summary judgment. The evidence relied upon must be "significantly probative" of specific facts,[10] and "material" in the sense that the dispute over them necessarily "affect(s) the outcome of the suite."[11]

---

8 FRCP 56(c).

9 Colotex Corp. V. Catrett, 477 U.S. 317, 325 (1986).

10 Anderson V. Liberty Lobby, Inc., 872 F.2d 179 181 (1st Cir. 1989).

11 Id. at 248

APPENDIX G

In other words, the party opposing summary judgment must demonstrate that there are bona fide factualissues which "need to be resolved before the related legal issues can be decided."[12] The First Circuit has condluded that an issue is genuine "if the evidenceis such that a reasonable jury could return a verdict for the nonmoving party."[13] The court's function in ruling on a motion for summary judgment is to determine whether or not such a genuine issue exists, and not to resolve such existing factual issues.[14]

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12 Mac V. Great Atlantic and Pacific Tea Co., 871 F2d 179 181 (1st Cir. 1989)

13 Oliver V. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988) (quoting Anderson, supra, 477 U.S. at 248).

14 United States V. Diebold, Inc., 369 U.S., 654, 82 S.Ct. 993 (1962), Adickes V. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970), Anderson, supra, at 248; Local No. 48, United Brotherhood of Carpenters and Joiners

APPENDIX G

In federal civil rights actions, federal district courts must give state court judgments the same res judicata effect that the state's own law rescribes.[15] In Rhode Island, res judicata bars any relitigation (1) of the same cause of action (2) between the same parties or their privies (3) after final judgment has been rendered on the marits in the first suit.[16] The bar applies to all matters that could have been raised and determined in the original

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V. United Brotherhood of Carpenters and Joiners, 920 F2d 1047, 1050 (1st Cir. 1990); Garside V. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990).

15 28 U.S.C. § 1738 (1988); Migra V. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Isaac V. Schwartz, 706 F2d 15, 16 (1st Cir. 1983)

16 Griffin V. Rhode Island, 760 F.2d 359, 360 (1st Cir.), cert. denied, 474 U.S. 845 (1985); Providence Teachers Union V. McGovern, 319 A.2d 358, 361, 113 R.I. 169, 172 (1974).

action, including federal constitutional and civil rights questions, even if they were not actually raised.[17] Federal and state courts have concurrent jurisdiction over the federal civil rights statutes upon which the plaintiffs base their claims.[18] Because the plaintiffs could litigate their constitutional allegations in state court, "(i)t is hornbook law that the principles of res judicata apply" to their civil charges.[19] In short, plaintiffs here are barred from asserting

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17 Migra, 465 U.S. at 83-85; Griffin, 760 F.2d at 360.

18 42 U.S.C. §§ 1981 - 1983.

19 Griffin, 760 F.2d at 360; see also Casagrande V. Agoritsas. 748 F.2d 47, 48-49 (1st Cir. 1984)

"claims" that previously were or could[20] have been litigated.

Plaintiffs have complained here that their "liberty rights" accruing under the "Newport City Charter", rights under the City of Newport Ordinance, and rights under the union collective bargaining agreement have been breached beacuse of the City of Newport's actions in

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20 Plaintiffs concede in thier response to the defendants' motions that they made a calculated decision to not raise any other theories of their case in the Superior Court so that they would have a better chance of succeeding on their "probationary status" claim:

> The only real issue involved here and which wasn't even addressed by the Defendants is whether the Plaintiffs should have alternatively plead (sic) in the Superior Court, that as probationary status police officers they should have been afforded procedural safeguards of their Liberty Rights under 288.05. However, for them to have done so in the Superior Court action would have had a deterimental and negative impact on the primary focus in the action, and would have presented a diametrically opposite claim for relief.

APPENDIX G

terminating them from employment. Unequivocally, these are issues arising out of the "same claim" previously litigated in Newport County Superior Court. The common nucleus of facts are the actions of the City of Newport that led up to the termination of both plaintiffs.

Conclusion

The plaintiffs have had their day in court. They are not entitled to another. Res judicata provides an independent and adequate basis for granting summary judgment against all the plaintiffs' claims, pursuant to Fed. R. Civ. P. 56. I recommend that the motions for summary judgment be granted and the pendent claim against Sperling be dismissed.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within

ten (10) days of its receipt.[21] Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the district court.[22]

Timothy M. Boudewyns
United States Magistrate Judge
December 18, 1992

---

21 Rule 32, Local Rules of Court; Rule 72(b), FRCP

22 Park Motor Mart, Inc. V. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States V. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

BRIEF OF DEFENDANTS

FRANK EDWARDS
in his capacity as City Manager of the City of Newport
and
STEVEN D. WEAVER
in his capacity as Chief of Police of the City of Newport

Attorney for Defendants

JOSEPH J. NICHOLSON, JR.
City Solicitor, BR #3164
City Hall, 43 Broadway
Newport, RI 02840
(401) 846-9600

September 25, 1992

APPENDIX H

September 25, 1992

United States District Court for the
District of Rhode Island
Clerk's Office, Court House
Kennedy Plaza
Providence, RI 02903

Re: Dennis DiPinto, Pro Se and Kieran Cunningham, Pro Se vs. Frank Edwards, et al - CA No. 92-0068 T

Dear Sir/Madam:

Enclosed herewith, relative to the above-entitled matter, are the following:

1) Moton for Summary Judgment
2) Statement of Undisputed Facts and Affidavit
3) Memorandum in Support of Defendants' Motion for Summary Judgment

Kindly file the same for the City.

Sincerely,

Joseph J. Nicholson, Jr.
City Solicitor

Enclosure
xc: Messers: Dennis DiPinto and
Kieran Cunningham
Plaintiffs, Pro Se
P. O. Box 7072
Cumberland, RI 02864

Jeffrey Teitz, Esquire
CORCORAN, PECKHAM & HAYES, P.C.
61 Long Warf
Newport, RI 02840

APPENDIX H

CERTIFICATE OF SERVICE

I hereby certify that on the **25** day of September 1992, copy of the foregoing Motion for Summary Judgment was mailed to: Messrs. Dennis DiPinto and Ieran Cunningham, Plaintiffs, Pro Se, P.O. Box 7072, Cumberland, R.I. 02864.

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INDEX OF AUTHORITIES

Cases:	Page (s)
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APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

MOTION FOR
SUMMARY JUDGMENT

Defendents, Frank Edwards, in his capacity as City Manager of the City of Newport, and Steven D. Weaver, in his capacity as Chief of Police of the City of Newport, Rhode Island, hereby move for summary judgment. Supporting affidavit, documentation and memorandum are attached hereto and made a part hereof.

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DEFENDANTS
Frank Edwards and Steven D. Weaver,
by Their Attorney,

Joseph J. Nicholson, Jr.
City Solicitor, BR# 3164
City Hall, 43 Broadway
Newport, RI 02840
(401) 846-9600

Dated: 31 September 1992

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

MOTION FOR
SUMMARY JUDGMENT

Affiant, on oath, deposes and says:

1. That plaintiffs were both members of the Newport Police Department;

2. That Mr. Dennis DiPinto was terminated from the Newport Police Department on June 26, 1989;

3. That Mr. Kieran Cunningham was termined from the Newport Police Department on June 26, 1989;

APPENDIX H

4. That Mr. DiPinto filed a complaint regarding this termination, in Newport County Superior Court, entitled DENNIS DIPINTO V. FRANK EDWARDS, individually and in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, individually and in his capacity as Chief of Police of the Newport Police Department; and CAPTAIN JOSEPH SUBIN, in his capacity as acting Chief of the Newport Police Department, C.A. No. NC 89-0327;

5. That Mr. Cunningham filed a complaint regarding his termination, in Newport County Superior Court, entitled KIERAN CUNNINGHAM vs. FRANK EDWARDS, in his capacity as City Manager of the City of Newport, and STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, and CITY OF NEWPORT, C.A. No. 89-0410;

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6. That Mr. DiPinto received a trial on the merits regarding his termination from employment, with judgment being entered on December 22, 1989, dismissing his action with prejudice;

7. That Mr. Cunningham received a trial on the merits regarding his termination regarding his termination from employment with judgment being rendered on May 4, 1990, dismissing the action with prejudice;

8. That Mr. DiPinto did not appeal the case of DENNIS DIPINTO V. FRANK EDWARDS, individually and in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, individually and in his capacity as Chief of Police of the Newport Police Department; and CAPTAIN JOSEPH SUBIN, in his capacity as acting Chief of the Newport Police Department,

APPENDIX H

C.A. No. NC 89-0327, with judgment entered on December 22, 1989;

9. That Mr. Cunningham appealed the case of KIERAN CUNNINGHAM vs. FRANK EDWARDS, in his capacity as City Manager for the City of Newport, and STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, to the Supreme Court of Rhode Island;

10. That on October 18, 1991, an Order was entered dismissing Mr. Cunningham's appeal;

11. That all documents comprising the appendix of defendants Frank Edwards' and Steven D. Weaver's Motion for Summary Judgment are true and accurate copies of court records as they appear.

12. That the current action raises issues which are related to Mr. DiPinto's and Mr. Cunningham's termination from

APPENDIX H

employment with the City of Newport Police Department.

_____

Joseph J. Nicholson, Jr.
Affiant
City Solicitor, BR# 3164

Subscribed and sworn to before me this 25th day of September 1992.

_____

Notary Public

APPENDIX H

UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

MEMORANDUM
IN SUPPORT OF DEFENDANTS
FRANK EDWARDS' AND STEVE D. WEAVER'S
MOTION

FOR SUMMARY JUDGMENT

A. PLEADINGS

Plaintiffs allege that they were terminated from the city of Newport Police Department in violation of their "liberty rights as municipal employees as guaranteed under the Fourteenth Amendment of the Constitution, the collective bargaining agreement of the union

contract, along with the administrative covenants and ordinances of the City of Newport." (Paragraphs 10 and 13, Amended Complaint.)

Plaintiffs further allege that they were dismissed from their positions as City of Newport Police officers without notice and that the reasons for termination were unsubstantiated and misleading. (Paragraph 15, Amended Complaint.)

The Defendents herein have denied these allegations and, more importantly, raised in their responsive pleadings the afirmative defense of res judicata. (Page 3, Answer).

B. DESCRIPTION OF MOTION

Defendants move this Court, based upon the doctrine of res judicata, to dismiss with prejudice the claims

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contained in the subject complaint made against the defendants herein.

C. FACTS

Both Dennis DiPinto and Kieran Cunningham were members of the Newport Police Department. At the time of their employment, both were considered probationary employees under the Newport City Ordinances. Their status as probationary employees was debated in Newport Superior Court actions, respectively: Dennis DiPinto vs. Frank Edwards, et al, C.A. No. 89-0327; and Kieran Cunningham vs. Frank Edwards, et al, C.A. No. NC 89-0410.

Both Mr. DiPinto and Mr. Cunningham, prior to their probationary period expiring, were terminated from the Newport City Police Department.

Mr. DiPinto and Mr. Cunningham both objected to this termination and filed

complaints against the City of Newport in Newport County Superior Court.

Mr. DiPinto and Mr. Cunningham both received full trials before Mr. Justice Israel, at the time the presiding justice in Newport County. Attached to this Memorandum are copies of the complaints filed in Newport County Superior Court on behalf of the respective plaintiffs. This court should note that both complaints recite essentially the same prayer for relief.

On DiPinto's behalf, Joseph F. Penza, Jr., Esquire, of the law firm of Olenn and Penza, recites as the prayer:

WHEREFORE, plaintiff prays as follows:

> "A. That this Honorable Court issue a temporary mandatory injunction, ex parte, compelling the defendants to revoke the letter of dismissal in question, as it applies to the plaintiff, and restore the plaintiff to the position in the Newport City Police Department that he enjoyed prior to the illegal dismissal until

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such time that the hearing committee decides what penalty, if any, should be imposed upon the plaintiff for any alleged violation of the rules and regulations of the Newport Police Department.

"B. That this Honorable Court after hearing, issue a preliminary and permanent mandatory injuction compelling the defendants to revoke the letter of dismissal in question, as it applies to the plaintiff, and restore the plaintif to the position in the Newport City Police Department that he enjoyed prior to the illegal dismissal until such time that a hearing committee decides what penalty, if any, should be imposed upon the plaintiff for any alleged violation of the rules and regulations of the Newport Police Department.

"C. That this Court award attorney's fees pursuant to the provisions of 42 USC; Section 1988.

"D. That this Court issue such other Orders which it deems just under the circumstances of this case."

Under Count I of Cunningham's complaint, Joseph T. Houlihan, Esquire, and Jeffery J. Teitz, Esquire, of the law firm of Corcoran, Peckam & Hayes, P.C., request the following relief:

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"WHEREFORE, Plaintiff demands the following relief from this Honorable Court:

"1. Declare that Officer Cunningham is entitled to the rights afforded all permanent police officers under RIGL Chapter 42-28.6.

"2. Temporarily restrain and permanently enjoin the Defendants from terminating Officer Cunningham as a member of the Newport Police Department unless and until such termination is authorized by a hearing panel appointed pursuant to RIGL Chapter 42-28.6.

"3. Order the City to restore all pay and benefits, which Officer Cunningham has been wrongfully denied.

"4. Issue such other and further order as this Court deems just.

Also, the prayer for Count II of Cunningham's complaint, recites:

"WHEREFORE, Plaintiff demands the following relief from this Honorable Court:

"1. Declare that Officer Cunningham is entitled to the rights afforded all permanent police officers under the statutes of the State of Rhode Island and the contract between the City and the Fraternal Order of Police.

APPENDIX H

"2. Temporarily restrain and permanently enjoin the Defendants from terminating Officer Cunningham as a member of the Newport Police Department unless and until he is afforded all of the procedural and substantive rights to which all permanent police officers in the Newport Police Department are entitled pursuant to statute and contract.

"3. Order the City to restore all pay and benefits which Officer Cunningham has been wrongfully denied.

"4. Issue such other and further order as this Court deems just."

Also attached in the appendix are the respective answers filed on behalf of the City specifically denying the allegations contained in the respective Superior Court complaints.

More importantly, and for purposes of this motion, attached to this memorandum in the appendix is the written decisionof Mr. Justice Israel in the case of Cunningham vs. Edwards, et al, NC89-0410. Also attached to in the appendix

APPENDIX H

is the respective entry of judgment dismissing the Cunningham action with prejudice, rendering judgement on behalf of the City against Cunningham.

Further attached to the appendix is the Supreme Court of Rhode Island's Order in the case of Kieran Cunningham v. Frank Edwards, et al, Supreme Court No. 90-452-Appeal that summarizes and dismisses the appeal of judgment entered against Cunningham in Cunningham v. Edwards, et al, NC89-0410. That Order asserts:

> "This matter was before the Supreme Court pursuant to an order issued to both parties to appear and show cause why the issues raised in this appeal should not be summarily decided. In this case the plaintiff had appealed from the trial justice's denial of his complaint. The principal issue raised by this appeal is whether the plaintiff every achieved status as a permanent employee in the police department of the city of Newport.
>
> "After reviewing thememoranda submitted by the parties and after hearing counsel in oral argument, it

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is the conclusion of this court that cause has not been shown. The court is of the opinion that the trial justice ruled correctly but that the plantiff had not attained permanent status and therefore could be properly terminated without a hearing.

"Therefore, the plaintiff's appeal is denied and dismissed, the judgment appealed from is affirmed and thepapers of the case are remanded to the Superior Court."

In the case of DiPinto v. Edwards, et al, NC89-0327, Mr. DiPinto chose not to take advantage of his appellant rights. The judgment filed in the case of DiPinto vs. Edwards, et al, NC89-0327, became the last word in this action. The judgment merely recites:

".....that the plaintiff take nothing, that the action be dismissed on the merits, ..."

However, attached to the appendix is the Court's bench decision for review.

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D. ISSUE

WHETHER PLAINTIFFS' ACTIONS SHOULD BE DISMISSED BASED UPON THE DOCTRINE OF RES JUDICATA.

E. POINTS AND AUTHORITIES

DEFENDANTS HEREIN HAVE PLEAD THE AFFIRMATIVE DEFENSE OF RES JUDICATA WHICH IS APPLICABLE TO THE MATTER AT HAND AND DISPOSES OF THIS CASE IN SUMMARY FASHION.

Both plaintiffs have had their day in court and seek now to relitigate the issue regarding their termination from employment with the City of Newport.

This court is well-acquainted with the basis of the doctrine of res judicata. Its purpose is:

> ".....to establish a point at which litigation comes to an end." Victor DeCosta v. Viacom International, Inc., 758 F.Supp. 807 (D.R.I. 1991).

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In the case of Julia Eliza Griffin, v. State of Rhode Island, et al., 760 F,2d 359 (R.I. 1985) the court wrote:

> "In section 1983 actions, federal courts must give state court judgments the same res judicata effect as is prescribed by the state law wherein the action rises." Migra v. Warren City School District, 465 U.S. 75, 104 S.Ct, 892,898, 79 L.Ed.2d 56 (1984).
>
> "In Rhode Island, the doctrine of res judicata operates as an absolute bar to the relitigation of the same cause of action between the same parties, when a final judgment has been rendered on the merits. Corrado v. Providence Redevelopment Agency 113 R.I. 327, 302 A.2d 785, 790 (1973)."

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In short, plaintiffs here are barred from asserting "claims" that previously were or could have been litigated.

This court specifically has defined the boundaries of a "claim" for res judicata purposes.

> ".....Rhode Island follows the principles set forth in the Restatement (Second of Judgments. See Capraro v. Tilcon Gammino, Inc., 751 F.2d 56, 58 (1st Cir. 1985), cert. denied, 475 U.S. 1084, 106 S.Ct. 1466, 89 L.Ed.2d 722 (1986): Gonsalves v. Alpine Country Club, 563 F. Supp. 1283, 1287 (D.R. I. 1983), aff'd, 727 F.2d 27 (!st Cir. 1984). One of those principles is that, in determining whether identity of claims exists, the relevant inquiry is whether the claims arise from a common nucleus

of facts or seek redress for the same injury. That approach is codified in s 24 of the Restatement which adopts what is termed a 'transactional' test. Section 24 provides that: (1) [T]he claim extinguished includes al rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Restatement (Second) of Judgments s 24(1).

"Consequently, a plaintiff may not get additonal bites of the apple by demanding multiple forms of relief for the same injury or by cloaking a single claim in a variety of legal theories. Res judicata cannot be circumvented by

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'splitting' one cause of action into a multiplicity of suits. Restatement (Second) of Judgments s 24 comment c; Moore's P 0.410[1]."

Here, this case doesn't require extensive analysis. There can be np dispute in this matter concerning the identity of the parties nor can there be a dispute that there hasn't been a valid entry of the final judgment in either case.

Plaintiffs have complained here that their "liberty rights" accruing under the "Newport City Charter", rights under the City of Newport Ordinance, and rights under the union collective bargain agreement have been breached because of the City of Newport's actions in terminating them from employment. Unequivocally, issues arising out of the "same claim" previously litigated in

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Newport County Superior Court. The common nucleus of facts are the actions of the City of Newport that led up to the termination of both plaintiffs. The City of Newport was deemed by the Newport County Superior Court, and ultimately by the Supreme Court in the Cunningham case, to have acted correctly in terminating Mr. Cunningham. Mr. DiPinto went no further than the Superior Court in objecting to his termination.

Plaintiffs litigate here claims that were raised or could have been raised in Newport County Superior Court. This case is a classic "res judicata" case.

The focal point of the Newport County Superior actions is the termination of the resoective plaintiffs from employment. The focal point of this action is the termination from

APPENDIX H

employment. Paragraph 11 of the Cunningham comlaint recites:

> "11. The aforementioned conduct of the Defendants ' violated both the laws of the State of Rhode Island and the ordinances of the City of Newport."

Mr. DiPinto's complaint recites:

> "20. The defendants in terminating the plaintiff, prior to a hearing on the issues by a hearing committee, have violated the specific provisions of Section 42-28.6-4."

These complaints refer to both violations of state law by the City in terminating the plaintiffs from employment.

IN sum, both plaintiffs have had their opportunity to litigate the issues

contained in the subject action. In many respects, parts of those issues were litigated.

This court should grant summary judgment as a matter of law on the basis of the doctrine of res judicata.

F. CONCLUSION

A review of this memorandum, and a review of the documentation contained in the accompanying appendix, should lead this court to the inescapable conclusion that this action should be dismissed on the based on the doctrine of res judicata.

The common nexus between the two lawsuits are the claims regarding plaintiff's termination from employment.

The respective defendants have litigated plaintiff;s termination once already. Further litigation is contrary to the doctrine of res judicata.

APPENDIX H

DEFENDANTS
Frank Edwards and
Steven D. Weaver,
By Their Attorney,

Joseph J. Nicholson, Jr.
City Solicitor, BR# 3164
City Hall, 43 Broadway
Newport, RI 02840
(401) 846-9600

Dated September 1992

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September 1992, copy of the foregoing Memorandum was mailed to: Messrs. Dennis DiPinto and Kieran cunningham, Plaintiffs, Pro Se, P.O. Box 7072, Cumberland, R.I. 02864.

_____

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Cases		Page
A)	Dennis DiPinto vs. Frank Edwards, et als	
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C)	Richard DeCosta v. Viacom International, Inc., 78F. Supp. 807 (D.R.I./1991) .	C-1
D)	Julia Eliza Griffin, v. State of Rhode Island, et al., 760 F.2d 359 1985	C-2

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

MOTION TO DISMISS
OR
FOR SUMMARY JUDGEMENT

Now comes John Sperling, in his capacity as President of Lodge #8 of the Fraternal Order of Police, and moves to dismiss the complaint against him, or in the alternative, for entry of summary judgement. Supporting affidavit, documentation and memorandum are attached hereto and made a part hereof.

John Sperling

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John Sperling
By his attorneys
Corcoran, Peckham & Hayes

by_____
Jeffrey J. Teitz

Certification

I hereby certify that on **30th** day of **September**, 1992, a copy of the within Answers was mailed to Messrs. Dennis DiPinto and Kiernan Cunningham, Plaintiffs, pro se, at P.O. Box 7072, Cumberland, RI 02864 and to Joseph Nicholson, Esq. City Solicitor, Newport City Hall, 43 Broadway, Newport, RI 02840

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO
KIERAN CUNNINGHAM
Plaintiffs

VS. Civil Action No. 92-0068-T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City Manager of the City of Newport; STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, et al
Defendants

MEMORANDUM

I. MOTION TO DISMISS

The main focus of Plaintiff's Complaint is the City of Newport and its agents Edwards and Weaver. Almost all of the allegations challenge actions taken by the city in which Lodge #8 of the Fraternal Order of Police, hereinafter "Lodge #8", and its President, John Sperling, played no role. The only allegation directed against Lodge #8 is

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contained in paragraph 19 of the complaint, claiming that the union violated its duty of "fair representation". The Plaintiffs' have offered no substantiation or support for that allegation.

As their basis for invoking the jurisdiction of the federal Court, Plaintiffs cite sections of the United States Code which are relevant to their claims against the City, but not to their claims against Lodge #8. Lodge #8 is not a governmental entity nor does it exercise governmental powers. It is a labor organization which, pursuant to its collective bargaining agreement with the City of Newport, is "the sole and exclusive bargaining agent for all permanent, uniformed members of Police of the City, with the exception of the Chief of said Division." The Agreement for the

relevant year, July 1, 1988 to June 30, 1989, is appended hereto and marked Exhibit 1. The sole jurisdictional basis for including Lodge #8 in this lawsuit is pendant jurisdiction.

The City of Newport has filed a motion for summary judgement based upon the doctrine of res judicata. Should that motion be granted there would be no remaining jurisdictional basis for the complaint against John Sperling in his capacity as the President of F.O.P. Lodge #8, and that complaint should be simultaneously dismissed.

II. Motion for Summary Judgement

The sole allegation made by Plaintiffs against Lodge #8 is that it breached its duty of fair representation. Yet, they cite no factual basis for such an allegation. The duty of fair representation which a labor organization

APPENDIX I

owes its members is established under Rhode Island law by the case of Belanger vs. Matteson 115 RI 332, 346 A2d 124 (1975). While that case involved a promotional dispute between two union members, the standard for union decision making which it established is equally applicable here. The Court stated:

> The Union must choose its side in a nonarbitrary manner, based on its good faith judgement as to the merits of the conflicting claims. We are not mandating a full-blown hearing replete with strict rules of procedure and adversary proceedings. If the union investigates in an informal manner, this would be sufficient so long as its procedure affords the two employees the ability to place all the relevant

information before the union. 115 RI 332 at 344.

In the Cunningham and DiPinto cases, both officers were afforded hearings before the board of directors of the Union. Each was afforded the opportunity to place all information which he deemed relevant before the union's governing board. Each man was asking Lodge #8 to expend union funds to initiate a legal action on his behalf contesting the City's action. In order to protect the interest of all the members of the union and to responsibly manage their funds, the board of directors is obligated when it receives such a request to evaluate the legal merit of the office's claim. That is precisely what the board did when it received Cunningham's and DiPinto's requests.

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The key issue in both cases was the officer's status as a "probationary police office." If he was, in fact a probationary officer, the City had great latitude in deciding whether to terminate him. Both the Law Enforcement Officers' Bill of Rights, GLRI Chapter 42-28.6, and the grievance and arbitration provisions of the contract with the City could be invoked only by "permanent" officers, not those who were "probationary." DiPinto had served on the force less than one year when he was terminated and was therefore clearly a probationary officer at the time of his discharge. Thus, the legal avenues available to him to contest the discharge were extremely limited and the standard which the City had to meet to justify the discharge was low. The City's basis for discharging him was that DiPinto had been charges with a crime

APPENDIX I

based on an incident which occurred while he was off duty. By contrast, Cunningham had served in the Department for sixteen months prior to his discharge. The standard probationary period for a police officer provided for in Newport's personnel ordinance was one year. The Chief of Police had extended Cunningham's probation for an additional six months based upon an incident which occurred during his first year in the department. F.O.P. Lodge #8 had never consented to the extension of probation and considered the action improper.

The board of directors considered the facts presented by each officer at his hearing, and analyzed the collective bargaining agreement ad the relevant statutes and ordinances as they applied to the facts of each case. The board voted not to authorize the use of union

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funds to support a legal action by DiPinto based upon its conclusion that such a legal action was not warranted and would not succeed. The board voted to authorized the use of union funds to support a legal action by Cunningham based upon its determination that he should be afforded all the rights of a permanent employee since he served more than one year on the department. A civil action was subsequently brought on Cunningham's behalf in the Rhode Island Superior court and his claims were "denied and dismissed" after a full hearing. When Cunningham requested Lodge #8 to fund an appeal to the Supreme Court, it again afforded him a hearing before the union's governing board. After review, the board declined to authorize further funding.

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The record as set forth in the affidavit of John Sperling, appended hereto and marked Exhibit 2, demonstrates that in both the Cunningham and DiPinto cases Lodge #8 acted in good faith after hearing in a nonarbitrary manner Plaintiffs have provided no evidence to the contrary. Lodge #8 fully met its duty of fair representation. Accordingly summary judgement should be granted.

John Sperling
by his Attorneys
Corcoran, Peckham and Hayes

by_____
Jeffrey J. Teitz

Certification

I hereby certify that on **30th** day of **September**, 1992, a copy of the within Answers was mailed to Messrs. Dennis DiPinto and Kiernan Cunningham, Plaintiffs, pro se, at P.O. Box 7072, Cumberland, RI 02864 and to Joseph Nicholson, Esq. City Solicitor, Newport City Hall, 43 Broadway, Newport, RI 02840

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS DIPINTO,
KIERAN CUNNINGHAM,
PLAINTIFFS

vs C.A. NO. 92-0068 T

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police, FRANK EDWARDS, in his capacity as City manager of the City of Newport, STEVEN D. WEAVER, in his capacity as Chief of Police of the City of Newport, Rhode Island, ROBERT MCKENNA, in his capacity as Mayor of the City of Newport, and TERESA CROTEAU, in her previous capacity as personnel director for the city of Newport.
DEFENDANTS

VERIFIED THIRD AMENDED COMPLAINT AND PRAYERS FOR INJUNCTIVE RELIEF

Plaintiffs, Dennis DiPinto and Kieran Cunningham bring this action to recover their previous positions as police officers in the City of Newport, RI. Also, all back pay, benefits, seniority, and other fringe benefits. Plaintiffs also seek injunctive relief from

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defendants(s) with respect to any disciplinary procedure for the reasons originally executed in the termination letter(s) dated June 26, 1989. Plaintiffs further seek $250,000.00 for each Plaintiff for punitive damages and other damages the court deems appropriate.

Jurisdiction

The Court has jurisdiction over the subject matter of this action pursuant to 29 U.S.C.S. 185, 42 U.S.C.S. 1983 and pursuant to Court's pendant jurisdiction.

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The Parties

1. Plaintiffs, Dennis DiPinto and Kieran Cunningham residing at 93 Scott Road, Cumberland, RI and 31 Powell Ave., Newport, RI, respectively.

2. The defendant, John Sperling is a resident of the State of Rhode Island, and at all times material hereto, was the President of Lodge #8 of The Fraternal Order of Police.

3. The defendant Frank Edwards, is a resident of the State of Rhode Island, and at all times material hereto was the City manager of the City of Newport.

4. The defendant Steven D. Weaver, is a resident of Rhode Island, and at all times material hereto was the chief of the Newport Police Department.

5. The defendant Robert McKenna, is a resident of the State of Rhode Island, and at all times material hereto, was

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City Council President of the City of Newport, RI.

6. The defendant, Teresa Croteau, is a resident of the State of Rhode Island, and at all times material hereto, was personnel director for the City of Newport, RI.

Count 1

5. Plaintiffs DiPinto and Cunningham were appointed to their positions as specifically prescribed by city ordinance 276.13, as municipal employees, and assigned as full time members of the city police department.

6. Plaintiff Kieran cunningham, on or about february 28, 1988, was sworn-in and hired as a police officer for the City of Newport.

7. Plaintiff Dennis Dipinto, on or about August 28, 1988, was sworn-in and

APPENDIX J

hired as a police officer for the City of Newport.

8. Plaintiffs DiPinto and Cunningham were "Regular Employees" as defined in 272.01(44) "means an individual receiving a regular appointment in either the classified or exempt service."

9. Defendants awarded Plaintiffs with medical, dental, life and retirement benefits, as is given all municipal employees, on completion of a six month tenure. Although the accumulation and implementation of these benefits are addressed in the city ordinances and union contract, there are no provisions for the attainment of these benefits. It is the unwritten policy and standard procedure of the city personnel department to affirm these acquired benefits to all municipal employees upon

APPENDIX J

completion of six months of satisfactory employment.

10. Plaintiffs DiPinto and Cunningham were sworn and dues paying members of Lodge #8 of the Fraternal Order of Police, which is the sole bargaining agent between the City of Newport and the Newport Police Department.

11. Plaintiffs DiPinto and Cunningham had liberty rights as municipal employees as guaranteed under the Fourteenth Amendment od the Constitution, the collective bargaining agreement of the union contract, along with the administrative codes and ordinances of the City of Newport.

12. Plaintiffs were entitled to all rights of labor as afforded by Federal, State, and Local law, in addition to the rights afforded under the collective bargaining agreement.

APPENDIX J

13. Defendants, without notice, dismissed Plaintiffs from their positions on June 26, 1989.

14. Defendants, in letters dated June 26, 1989, cited several issues of misconduct for the reason of termination for both Plaintiffs, and discharged Plaintiffs under authority of city ordinance 288.06 (a) which states "At any time during the probationary period, the City Manager may separate an employee whose performance does not meet the required standards."

15. Plaintiffs were neither notified nor given an opportunity to answer the alleged charges directed against them. Plaintiffs furthermore contend the reasons for their dismissal contained in the letters of termination dated June, 26, 1989 are false, misleading, unsubstantial and biased. Defendants

APPENDIX J

violated Newport City Charter Chapter VI sec.1 "Appointment and Discharge of Subordinates- There shall be a personnel merit system, the provisions of which shall be prescribed by ordinance to ensure that employment in the City government is based upon equal opportunity and based on merit and fitness, free of personal and political consideration; and to further ensure that all personnel actions are based on a comprehensive evaluation of an individual's qualifications to perform the duties and responsibilities of the position."

16. Defendants also violated subsequent city ordinance 288.05 which clearly dictates the procedure afforded to employees subject to dismissal. "The City Manager may dismiss any employee for the good of the City service for any of

APPENDIX J

the following reasons":**** "The employee shall be furnished an advanced written notice containing the nature of the proposed action, the reasons therefor and his or her right to answer the charges, orally or in writing. This notice shall be furnished at least one calendar week prior to the proposed effective date of the action.

During the advanced notice period, the employee may be retained in duty status, placed on leave or suspended with or without pay at the discretion of the City Manager.

If the employee fails to respond to the advance notice, the proposed action of the City Manager shall be effective on the date specified with no need for further action. Otherwise t, the City Manager shall carefully consider the reply of the employee before making a

APPENDIX J

final decision, and at the earliest possible moment shall transmit to the employee a letter containing his final decision.****"

17. Defendants violated the collective bargaining agreement, Article 14. Disciplinary Action b) "Interrogation or hearing upon departmental charges shall be conducted pursuant to the disciplinary sections of the Classified Civil Service Merit Ordinance of the City of Newport, as amended, and pursuant to the Rules and Regulations of the Newport Police Department."

18. Defendants cited and released damaging information regarding the termination of the plaintiffs to various city departments such as the Personnel Director, local newspapers, Rhode Island Department of Employment Security without affording the Plaintiffs the

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Constitutional Liberty Right to "clear their name" in the eyes of the public. This information was included in the letters of termination and further transmitted via hearsay, damaging the Plaintiffs' good name, reputation and honor.

19. The Fraternal Order of Police Lodge #8 violated Article 1 Union Security: b) "Fair representation. Lodge #8 agrees fairly to represent all employees in the bargaining unit." The President of the Fraternal Order of Police did not afford or inform the Plaintiffs of their rights under the collective bargaining agreement. The selective application and interpretation of the city ordinances and collective bargaining agreement did not afford the Plaintiffs a clear opportunity to exercise their statutory and contractual rights of procedure that not

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only are afforded a police officer, but a municipal employee as well.

COUNT II

20. Each of the allegations contained in Count 1 of this Complaint are incorporated herein as if restated in full.

21. Plaintiffs Dennis DiPinto and Kieran Cunningham were municipal employees of the City of Newport and active members of the Fraternal Order of Police, Lodge No. 8 which is the sole and exclusive bargaining agent for all members of the Newport police department.

22. Pursuant to Article 14. section b) "Interrogation or hearing upon departmental charges shall be conducted pursuant to the disciplinary sections of the Classified Civil Service Merit Ordinance of the City of Newport, as amended, and pursuant to the Rules and

APPENDIX J

regulations of the Newport Police Department", the City violated the contractual agreement and subsequent municipal ordinance 288.05, which details a specific procedure and statutory rights afforded the Plaintiffs. "The employee shall be furnished an advance written notice containing the nature of the proposed action, the proposed action, the reasons therefore and his or her right to answer the charges, orally or in writing."

23. The City, acting under "color of law" violated the Plaintiffs Constitutional Rights, Civil Rights, Labor Rights, City Ordinance Rights, and Contractual Rights circumventing all required procedure and protocol. The City intentionally attached a stigma to the Plaintiffs; by their actions and undefended accusations continued in the

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publicized letters of termination dated June 16, 1989, that foreclosed the Plaintiffs freedom to take advantage of future employment opportunities.

24. The Defendants did not afford the Plaintiffs the rights of City Ordinance Chapter 292. Chapter 292.03 outlines the grievance procedure 292.03(a). "A Personal Appeals Board shall be established consisting of three members. Two shall be appointed by Council and the third elected from among employees in the classified service. Members shall respect the application of merit principles to public employment. No member of the board shall hold or be a candidate for any elective office." (e) "The Board shall serve as the final board of appeals on questions arising in the administration of Chapters 272 through 292."

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COUNT III

25. Each of the allegations contained in Count I and Count II are incorporated herein as if restated in full.

26. Plaintiffs Dennis DiPinto and Kieran Cunningham were municipal employees of the City of Newport and active members of the Fraternal Order of Police, Lodge No. 8 which is the sole and exclusive bargaining agent for all members of the Newport police department.

27. Plaintiffs assert jurisdiction in the Federal Court specifically conferred by 29 U.S.C.S. 185(a).

28. Plaintiffs, as bonafide union members of Lodge #8 were beneficiaries of the terms and provisions set forth in the collective bargaining agreement between the City of Newport and Lodge #8, Fraternal Order of Police; July 1, 1988 to June 30, 1989 and entitled to the

services and protection provided to them by the union.

29. Said agreement sets forth the unions duty of fair representation to the union employee for the arbitrary abuses of the procedures of grievance, arbitration and dismissal by his employee. Such abuses of procedure by the employer had been initiated against the Plaintiffs through the tenure of their employment with the City of Newport and culminating in the dismissal, wrongfully, on June 28, 1989. The union by actions, failed to perform its duty to the Plaintiffs as set forth in the collective bargaining agreement, fairly, honestly and without discrimination.

30. during the course of all proceedings, the union failed to act responsibly to vindicate the rights of the Plaintiffs when they suffered an

abridgement of the same at the hands of their employee. Such inaction as well as improper actions by the union constitutes a breach of the duty of fair representation under the collective bargaining agreement and a violation of 29 U.S.C.S. 185(a).

WHEREFORE, Plaintiffs Dennis DiPinto and Kieran Cunningham respectfully requests the following relief from this Honorable Court:

A. Grant oral hearing upon the issues herein, and prior to the granting of any motions by the Defendants.

B. Declare that the Plaintiffs were entitled to all Constitutional, Statutory, and Ordinance rights at the time of termination on June 26, 1989, and restore them to the position they enjoyed prior to their legal dismissal.

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C. Order the City to restore all pay, benefits and seniority which Plaintiffs have been wrongfully denied.

D. Enjoin the City of Newport to further harm the Plaintiffs for any issues executed int he letters of termination of June 26, 1989.

E. Award punitive damages of $250,000.00 for each Plaintiff for the irreparable harm against their character, honor, and reputation without affording them the liberty rights and equal protection afforded under the Fourteenth Amendment of the Constitution of the United States, and applicable statutes, ordinances and contracts.

F. That this court award attorney's fees pursuant to the provisions of 42 USC; Section 1988.

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G. That this Court issue such other Orders which it deems just under the circumstances of this case.

RESPECTFULLY SUBMITTED,

By their Attorney,

Kevin McBurney, Esquire
McBurney Law Offices
100 Cottage Street
Pawtucket, RI 02860
Bar #2719
401/722-0800

APPENDIX J

December , 1992

State of Rhode Island
Providence, SC

Then personally appeared before me the above-named Dennis DiPinto and Kieran Cunningham and swore that the allegations contained in the foregoing Verified Amended Complaint and Prayers for Injunctive Relief are true, except those based on information and belief and as to those they believe to be true.

_____
Notary Public
My Commission Expires

Dennis DiPinto_____

Kieran Cunningham_____

Dated: December , 1992

Plaintiffs Hereby Claim A Jury Trial and Designate Kevin McBurney, trial counsel.

APPENDIX K

AFFIDAVIT

I, **JOHN SPERLING**, under oath, hereby make affidavit and say:

1) I am a Sergeant in the Newport Police Department and I am currently and was at all times complained of in the within case, President of Lodge #8 of the Fraternal Order of Police, hereinafter referred to as FOP Lodge #8.

2) Under the terms of its collective bargaining agreement within the City of Newport entered into pursuant to Chapters 28-9.2 of the General Laws of Rhode Island, Lodge #8 is "the sole and exclusive bargaining agent for all permanent, uniformed members of police of the City, with the exception of the Chief of said Division."

3) Article 1, Section 6 of said contract defines a "permanent" employee of the Newport Police Department covered

by the contract as "one who is defined Section 272.01 (N36) of the City Code, that is, an employee who has completed his designated probationary period." The ordinance provides that newly appointed police officers "shall serve a one-year probationary period."

4) "The Law Enforcement Officers Bill of Rights," Chapter 42-28.6 of the General Laws of Rhode Island, which establishes procedural protection for police officers who are subject to discharge or other serious discipline by their employer, applies only to "permanently employed" officers.

5) Dennis DiPinto was sworn in as a probationary police office with the Newport Police Department on August 28, 1988 and was terminated by the City on June 26, 1989, after a criminal charge was brought against him based upon an

APPENDIX K

incident which occurred while he was off-duty.

6) Kieran Cunningham was sworn in as a probationary police officer with the Newport Police Department on February 28, 1988. Due to an incident which occurred on or about January 19, 1989, the City, without the consent of FOP Lodge #8, extended Cunningham's probation for an additional six months to August 28, 1989. He was subsequently terminated by the City on June 26, 1989.

7) At no time prior to the discharges on June 28, 1989, did any City of Newport official consult with or solicit the position of FOP Lodge #8 or its President regarding the contemplated termination of DiPinto and/or Cunningham, no did FOP Lodge #8 or its President consent to either of those terminations.

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8) After their terminations, both DiPinto and Cunningham sought the support of FOP Lodge #8 in contesting their terminations by funding legal challenges to the City's actions.

9) The board of directors of FOP Lodge #8 afforded DiPinto a hearing on December 13, 1989, regarding his employment status and the facts surrounding his termination. After hearing, FOP Lodge #8 concluded that DiPinto was not a permanent employee within the meaning of the collective bargaining agreement and thus unable to revoke its grievance and arbitration procedures to contest his discharge. Nor was he a permanent employee within the meaning of the "L.E.O. Bill of Rights." Based upon DiPinto's status as a probationary officer and the fact that the City's action was taken after a

APPENDIX K

criminal charge had been brought against him, FOP Lodge #8 voted unanimously not to participate in or fund a legal action against the City. Upon information and belief, DiPinto subsequently retained private counsel who initiated a civil action in Rhode Island Superior Court on his behalf. His complaint was dismissed by that Court after hearing.

10. The board of directors of FOP Lodge #8 afforded Cunningham a hearing on July 11, 1989 regarding his employment status and the facts surrounding his termination. After hearing, FOP Lodge #8 concluded that the City had violated the collective bargaining agreement when it extended Cunningham's period of probation from one year to eighteen months. Accordingly, he was in the opinion of Lodge #8, a permanent employee within that meaning of both the contract and the

APPENDIX K

"L.E.O. Bill of Rights" and was entitled to the procedural protection afforded by both. FOP Lodge #8 voted 7 - 1 to support Cunningham and to authorize a civil action in Rhode Island Superior Court to enforce his rights.

11) A lawsuit was subsequently initiated and prosecuted on behalf of Cunningham by FOP Lodge #8 and funded it. In that action "Kieran Cunningham vs. Frank Edwards, et al." N.C. 89-410, Mr. Justice Israel of the Superior Court conducted a lengthy hearing and reviewed memoranda of law. The Court rendered a written decision which determined that Cunningham was not a permanent employee within the meaning of either the contract or the statutes and that his discharge was proper, and therefore "denied and dismissed" Plaintiff's claims.

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12) Cunningham requested FOP Lodge #8 to fund the cost of an appeal to the Rhode Island Supreme Court. The board of directors afforded him a hearing on his request on May 10, 1990 and voted 6 - 1 not to fund such an appeal.

13) Upon information and belief, Cunningham subsequently retained independent counsel at his own cost and did appeal Judge Israel's decision. On October 18, 1991, the Rhode Island Supreme Court dismissed Cunningham's appeal.

14) At no time did FOP Lodge #8 or its President concur in or consent to the termination of DiPinto or Cunningham by the City of Newport nor take any action adverse to their interest. Lodge #8 determined through its legal governing body to initiate a legal action on behalf of Cunningham and not to initiate legal

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action on behalf of DiPinto based upon the facts of each case as determined at a hearing conducted by the board.

15) The decisions made by Lodge #8 were made in good faith by its governing body after hearing based upon its understanding of the collective bargaining agreement and the relevant statutes and ordinances as they applied to the facts of each case. It is the duty of Lodge #8 through its board of directors to make such decisions after hearing in the best interest of the entire membership and to prudently manage the financial resources of the organization.

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_____

Sgt. John Sperling
President, FOP Lodge #8

Subscribed and sworn to before me this 30th day of September, 1992.

_____

Notary Public

APPENDIX L

CHAPTER 292
Grievance Procedure

292.01 Statement of policy
292.03 Personnel Appeals Board
292.02 General procedure

CROSS REFERENCES
General administrative provisions-see CHTR. Ch. VI
Department of Personnel - see ADM. Ch. 244
Employees generally - see ADM. Ch. 272

292.01 STATEMENT OF POLICY.

The most effective accomplishment of the work of the City requires prompt consideration and equitable adjustment of employee grievances. It is the desire of the city to adjust grievances informally, and both supervisors and employees are expected to make every effort to resolve problems as they arise. However, it is recognized that there will be occasional grievances which will be resolved only after a formal appeal and review. Accordingly, the following procedure is established to ensure fair and impartial review.

(a) Members of the bargaining unit established by the State Labor Relations Board in Certification No. EE 1764

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shall follow the grievance procedure as outlined in the agreement between Council and State Public Employee Council No. 94.

(b) Members of the bargaining unit represented by the Newport Lodge No. 8, Fraternal Order of Police, shall follow the grievance procedure as outlined in the agreement between the City and Newport Lodge No. 8, Fraternal Order of Police.

(c) Members of the bargaining unit represented by Local No. 1080, International Association of Firefighters, AFL-CIO, shall follow the grievance procedure as outlined in the agreement between the City and Local No.

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1080, IA.F.F., AFL-CIO, (Ord. 53-79)

292.02 GENERAL PROCEDURE

The aggrieved employee or his representative shall take up his or her grievance with his or her immediate supervisor who shall take the necessary steps to adjust the complaint if it is within his or her power to do so.

If the immediate supervisor is unable or unwilling to adjust the grievance, the grievance shall be put into writing and sent to his or her division or department head with a copy to the Department of Personnel. The department or division head shall discuss the grievance with the employee and his or her representatives, if any, and attempt to adjust the problem if it is within his or her power to do so. The division or department head shall reduce his or her findings in the cast

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to writing within two days and advice the employee and the Personnel Department of his or her decision in the case.

Should the employee and/or the union representing such employee still be grieved, the employee and/or the union representing such employee should apply in writing to the City Manager stating the reasons for his or her grievance, including all pertinent facts of the case.

Within ten days after receiving the complaint, the City Manager shall call a meeting which shall include the department head, the complainant and representatives of his or her own choosing, and any other person or persons involved in the complaint. The City Manager shall preside at the meeting and hear the entire case to obtain all the facts.

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The City Manager shall make a complete report of his or her findings and render a decision to the employee and department head in writing.

The Personnel Appeals Board may review the decision of the City Manager and its decision shall be final.

(1968 Code *24-161; Ord. 376; Ord. 9-68)

292.03 PERSONNEL APPEALS BOARD

(3) A Personnel Appeals Board shall be established consisting of three members. Two shall be appointed by Council and the third elected from among employees in the classified service. Members shall respect the application of merit principles to public employment. No member of the Board shall hold or be a candidate for any elective office.

(b) Members of the Board shall serve for a term of three years. The

APPENDIX L

incumbent members of the existing Board shall continue in their present term.

(c) Employees in the bargaining unit designated by the State Labor Relations Board in Certification No. EE 1764 shall not be eligible to participate in the election of, or to serve as members of, the Personnel Appeals Board.

(d) The Personnel Appeals Board shall organize itself by electing one member as Chairman annually. Each member shall take an official oath of office before assuming his duties and affirm a will and belief to support the merit system. Vacancies during any term will be filled by Council or by employee election for the balance of the term of the vacancy. Members shall serve without compensation.

(e) The Board shall serve as the final board of appeals on questions arising in

APPENDIX L

the administration of Chapters 272 through 292.

(f) The Board shall meet at lease once every three months.

(g) The Board shall act in an advisory capacity to the City Manager.

(h) The Board shall investigate all appeals from employees relating to the administration of Chapters 272 through 292.

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NEWPORT CHARTER

SECTION 5-8. ACTING MANAGER

The Council shall appoint some capable person as Acting Manager during a vacancy in the office. Such appointment shall be on a temporary basis until a Manager has been appointed and has assumed his duties. Such person while he is Acting Manager shall have all the powers and duties conferred by this Charter on the City Manager.

CHAPTER VI. GENERAL ADMINISTRATIVE PROVISIONS

SECTION 6-1. APPOINTMENT AND DISCHARGE OF SUBORDINATES.

There shall be a personal merit system, the provisions of which shall be prescribed by ordinance to ensure that employment in the City government is based upon equal opportunity and based on merit and fitness, free of personal and political consideration; and to further ensure that all personnel actions are based on a comprehensive evaluation of an individual's

qualification to perform the duties and responsibilities of the position.
(As amended by Sec. 1, Chapter 527, P.L. 1985).

SECTION 6-2. COMPENSATION OF EMPLOYEES.

Except as provided herein the Council shall have power to fix the compensation of all officers and employees of the City, provided, however, that each officer and employee of the City shall receive the compensation received by him at the time of the adoption of this Charter until such time as the Council shall alter the amount of such compensation.

SECTION 6-3. REQUIRED DUTIES.

Any duty previously required by law to be performed by any officer of the City shall be performed by such officer as the Council shall designate, notwithstanding the title or designation of the officer.

SECTION 6-4. OATH OF OFFICE.

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Every officer, elected or appointed, shall take and subscribe the following oath of office: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the State of Rhode Island and Providence Plantations, and that I will faithfully discharge the duties of such office to the best of my ability," and shall file such oath, duly certified by the officer before whom it was taken, as a public record in the office of the City Clerk.

SECTION 6-5. SURRENDER OF BOOKS, PAPERS, MONEY AND EFFECTS.

Whenever any officer or employee shall resign or be removed from office, or the term for which he shall have been elected or appointed shall expire, he shall, immediately, surrender to his successor in office all the books, papers, moneys and effects of the City in his custody. In the event there is no successor said books, ...

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A G R E E M E N T

by and between the

City of Newport, Rhode Island

and

Lodge No. 8, Fraternal Order of Police

July 1, 1988 to June 30, 1989

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19. Reimbursement for Education

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AGREEMENT

THIS AGREEMENT entered into this ___ day of July, 1988, by and between the CITY OF NEWPORT, a municipal corporation of the State of Rhode Island, hereinafter called the "City" and THE FRATERNAL ORDER OF POLICE, NEWPORT LODGE NO. 8, hereinafter referred to as "Lodge No. 8". This contract covers the fiscal year commencing July 1, 1988, and ending June 30, 1989.

W I T N E S S E T H

WHEREAS, the State of Rhode Island has adopted Chapter 9.2 Title 28, of the General Laws of Rhode Island, 1956, as amended, which chapter is known as "THE POLICEMEN'S ARBITRATION ACT", and pursuant to said Act the City has recognized Lodge No. 8, Fraternal Order of Police as the sole and exclusive

bargaining agent for all permanent, uniformed members of Police of the City, with the exception of the Chief of said Division; and

WHEREAS, It is the intent and purpose of the parties to set forth herein their entire agreement covering wages, salaries, hours and working conditions; to increase the efficiency and productivity of employees in the Division of Police and to provide for prompt and fair settlement of grievances without any further interruption of or other interference with the operation of the Division of Police;

NOW THEREFORE, the City and Lodge No. 8 agree as follows:

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ARTICLE 1. UNION SECURITY

a) Union Membership or Activity. Neither the City nor Lodge No. 8 shall interfere with the right of employees covered by this Agreement to become or not become members of Lodge No.8, and there shall be no discrimination against any such employees because of lawful Lodge No. 8 membership or non-membership or status.

b) Fair Representation. Lodge No. 8 agrees fairly to represent all employees in the bargaining unit.

c) The City shall deduct Union dues and assessments upon receipt of authorization from members of Lodge No. 8, and shall forward to the Treasurer of the Union such sums as deducted.

The city shall forward such deductions, each month following the month of deductions, to the Financial

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Secretary of Lodge No. 8. A permanent employee is one who is defined in Section 272.01 (N36) of the City Code, that is, an employee who has completed his designated probationary period.

All permanent employees of the Newport Police Department shall have the right to join or refrain from joining Lodge No. 8, the Fraternal Order of Police. Any employee who chooses not to join Newport Lodge No. 8, Fraternal Order of Police and who is covered by the terms of this Collective Bargaining Agreement shall, however, be required to pay to Newport Lodge No. 8, Fraternal Order of Police, an amount equal to the initiation fee uniformly required for membership in the Newport Lodge No. 8, and a monthly service fee equal to monthly dues charged members of the Newport Lodge No. 8, to defray the costs in connection with

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Newport Lodge No. 8's legal obligations and responsibilities as the exclusive bargaining agent of the employees covered by this Agreement.

In addition, any employee who chooses not to join Lodge No. 8 shall be required to pay an assessment uniformly levied upon all members of the Newport Lodge No. 8 in connection with costs relating to collective bargaining and/or arbitration concerning the terms and conditions of any proposed Collective Bargaining Agreement.

d) Officers of Lodge No. 8 or such policemen who are appointed by Lodge No. 8 as members of its collective bargaining negotiating committee, not to exceed three (3), ? shift, shall be granted time off with pay, and without requirement to make up such time, for official Lodge No. 8 business and/or conferences with the

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City; provided, however, that the foregoing shall be construed as limited the number of officers or members of the negotiating committee to three (3) in number.

e) Official delegates of Lodge No. 8, with the approval of the Chief of Police, shall be allowed reasonable time off, (not to exceed a total of 32 hours per contract year), without loss of pay, and without the requirement to make up such time, to attend the National and State Conventions of the Fraternal Order of Police. Requests for such leave shall be made in writing to the Chief of Police at least two (2) weeks in advance.

Official delegates shall be allowed additional time off with the approval of the Director of Public Safety upon the recommendation of the Chief of Police.

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f) The policemen of the City of Newport shall have no right to engage in any work stoppage, slowdown or strike. Lodge No. 8 shall not cause, call or sanction any work stoppage or strike.

g) The President and/or Vice-President of Lodge No. 8 shall be allowed time off, without loss of pay, and without the requirement to make up such time, to attend the monthly meetings of Lodge No. 8; and the President or Vice President and the State Trustee of Lodge No. 8 shall be allowed time off, without loss of pay and without the requirement to make up such time, to attend the regular monthly meetings of the Rhode Island Lodge of Fraternal Order of Police; provided, however, that the total of said leave shall not exceed four (4) hours for each such meeting.

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Requests for such leave shall be made in writing to the Chief of Police at one (1) week in advance.

ARTICLE 2. MANAGEMENT RIGHTS

Nothing here contained shall be construed to limit the right of the City to regulate, manage and control the Police Department of the City. The City shall retain the right to issue, through the Director of Public Safety, rules and regulations governing the operation and conduct of the Police Department.

ARTICLE 3. SENIORITY

Seniority of policemen shall be computed according to continuous service in each rank, except for patrolmen, where seniority shall be computed according to continuous service from the date of enrollment upon the Municipal Police Training School or upon the sworn oath to duty; provided, however, that a

patrolman's service in the Armed Forces of the United States while a permanent policeman shall be considered in computation of said policeman's continuous service with the Police Department; provided further, that such policeman does not re-enlist or continue his military service after the time of his original mandatory service period.

ARTICLE 4. DUTIES

a) A policemen's duties shall consist of the repression and prevention of crime and the enforcement of the laws and ordinances of the City of Newport and the statutes of the State of Rhode Island; such other service functions presently conducted by the Police Department; and such other duties as are, or may be prescribed by the Director of Public Safety in accordance with the provisions of the statutes of the State

of Rhode Island in such cases made and provided.

The Chief of Police may, however, also establish such other schedules as may be required, provided the establishment of such other shifts and tours of duty are reasonable to carry out the necessary police functions and are negotiated in advance with the Union.

Emergency* only, without obtaining the prior approval of the Fraternal Order of Police.

j) One hour at time and a half shall be paid to those in the ranks of sergeant, lieutenant, and captain should a monthly departmental staff meeting necessitate that they be called back to duty.

ARTICLE 5. HOURS OF WORK/OVERTIME

a) Work schedules for policemen shall be governed according to

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assignment. Officers assigned to work an administrative schedule work five (5) consecutive days, Monday through Friday. The regular work schedule for policemen shall consist of four (4) consecutive days of work, followed by two (2) consecutive days off. The regular work day shall consist of one (1) tour of duty or shift. The normal shift or tours of duty of the Newport Police Department shall be as follows:

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1. First Shift or Tour of Duty

   7:30 a.m. to 4:00 p.m.

   7:45 a.m. to 4:15 p.m.

2. Administrative Shift or Tour of Duty

   8:00 a.m. to 5:00 p.m.

   7:00 a.m. to 4:00 p.m.

3. Second Shift or Tour of Duty

   4:00 p.m. to 12:30 a.m.

   4:15 p.m. to 12:45 a.m.

4. Special Operations Shift or Tour of Duty

   6:00 p.m. to 2:00 a.m.

   7:00 p.m. to 3:00 a.m.

5. Third Shift or Tour of Duty

   12:30 a.m. to 7:30 a.m.

   12:45 a.m. to 7:45 a.m.

6. CID Shift or Tour of Duty

   8:00 a.m. to 5:00 p.m.

   7:00 a.m. to 4:00 p.m.

   4:00 p.m. to ~~12:30 a.m.~~

   6:00 p.m. to 2:00 a.m.

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b) For those assigned to the Administrative Shift, the Police Chief may establish an individual determined schedule rather than the normal shift, provided that individual officer and the President of FOP Lodge No. 8 both give their consent.

ARTICLE 6. VACATIONS

a) Annual leave shall be granted as provided in Chapter 286 of the Codified Ordinances of the City of Newport, dated November 1986, as follows:

1. One through ten years of services - four hours for each biweekly pay period;

2. Eleven through fifteen years of service -- six hours for each biweekly pay period; and

3. Over fifteen years of service -- eight hours for each biweekly pay period.

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In addition, an officer with less than five years of service shall receive two extra days per year of annual leave, an officer with at least ten but less than fifteen years of service shall receive tow and a half extra days per year of annual leave. Each officer shall be credited with the aforementioned additional leave on July 1st.

Annual leave may accumulate up to three hundred and twenty (320) hours and employees may sell back one hundred (100) hours of annual leave per fiscal year, in increments of fifty (50) hours.

b) Vacations may be granted with the several divisions of the Police Department according to seniority of rank, and then according to seniority in the Department.

ARTICLE 7. SICK LEAVE AND BEREAVEMENT LEAVE

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A) Sick leave and reasons for sick leave shall be subject in Title 10 of the City of Newport Code or Ordinances, except that eight (8) hours will be added to the sick leave balances of all Police Officers who are on the payroll as of July 1, (14 days). All members of the Department will earn one additional day of vacation leave as a reward for not taking any sick leave for one year (July through June) and said one additional day must be used within six months, with no reimbursement upon retirement.

b) Upon retirement, the employee will be paid for 55% of his accumulated sick leave.

c) In the event of death of a member of the family of employee, the City will grant reasonable time off without loss of pay for all scheduled work days falling within the three (3)

day period next following the day of a death in the immediate family (wife, husband, children, parents, parents-in-law, sister or brother).

For members of the family other than those cited above (grandparents, grandchildren), one work day shall be granted off; also, the maximum of four (4) hours off without loss of pay will be allowed to attend the funeral of an employee's Aunt or Uncle.

d) More time in individual cases, due to unusual circumstances, or for reasons other than those listed above, shall be granted, subject to the discretion of the City Manager.

e) If a death occurs in the immediate family during vacation, the days following within the funeral week procedure will not be charged to vacation time.

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f) Additional time, when required, shall be charged to annual leave.

g) Scheduled days off shall not be counted when computing bereavement leave.

ARTICLE 8. INJURY IN THE LINE OF DUTY

a) Policemen who are injured in the line of duty shall receive all benefits provided in Title 45, Chapter 19, Section 1, General Laws of Rhode Island, 1956, as amended.

b) Subject to the approval of the Chief of Police the City of Newport agrees to pay all expenses for inoculation of immunization shots for members of the policeman's family residing in his household when such becomes necessary as a result of said policeman's exposure to contagious diseases contracted in the line of duty.

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ARTICLE 9. RULES AND REGULATIONS

The City shall furnish each policeman with a complete set of Rules and Regulations governing the Police Department.

ARTICLE 10. CLASSIFICATION AND SALARY

A) Effective July 1, 1988, the salaries of all members of the Police Department covered by this Agreement shall be increased by 4.90% annually.

Steps	A.	B.	C.	D.
Police Officer				
Investigator				
Court Officer				
Sergeant				
Lieutenant				
Captain				

Classifications of Investigator and Court Officer shall be appointed by the Director of Public Safety upon recommendation of the Chief of Police.

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Investigators shall be paid the stated compensation for investigators in this contract commencing the day they assume their duties as investigators. The Director of Public Safety, upon the recommendation of the Chief of Police may, at his discretion, transfer any officer in or out of said classification without stating any reason. Said classifications will not be subject to competitive examinations for promotion in compliance with Title 10 of the ordinances of the City of Newport.

b) Patrolmen shall reach his maximum salary at the end of his third year of satisfactory service.

c) Sergeants, lieutenants and captains shall work temporarily in higher classifications with no temporary increase in pay. A patrolman will receive sergeant's pay only when he is

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assigned to and takes charge of an entire shift for one full tour of duty. The rate of pay shall be determined in the same manner as in permanent promotions.

d) The Police Chief shall be able to temporarily assign personnel as investigators for a period not to exceed three (3) months for the purpose of training and familiarization with the duties of an investigator, without the benefit of the increased compensation normally associated with that position. Police officers shall be afforded the opportunity to place their names on a list applying for temporary assignment as a investigator and the officers shall be selected for said assignment by seniority from amongst those applying. No officer shall be eligible for a second temporary assignment as an investigator until all officers who have applied for such an

APPENDIX M

assignment have been afforded that opportunity. The aforementioned temporary positions are intended to be in addition to the permanent complement of investigators which the department maintains. The department can only make such temporary assignments when there are at least nine (9) investigators receiving the increased compensation associated with that position.

ARTICLE 11. HEALTH AND LIFE INSURANCE

a) Health Insurance. Family coverage health insurance shall be provided by the City to all active policemen and retired policemen, who retired after July 1, 1982, except the case of unmarried policemen, who will be provided with individual coverage:

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Semi-private Blue Cross (365 days, full maternity benefits, students to age 25)

Blue Shield 100 (365 days, full obstetrical, medical emergencies, students to age 25)

Diagnostic JU No. 2 Ridger (See students to age 25)

Vision Care Rider

Major Medical ($100.00 deductible, 80-20% co-insurance coverage semi-private, students to age 25) with a policy 1; no less than one ($1,000,000) dollars in coverage

Chiropractic Rider.

which coverage shall be paid by the City.

Effective July 1, 1988, those retired members receiving Blue Cross/Blue Shield, Plan A, shall be upgraded to Blue Cross/Blue Shield, Plan 100, with all of

APPENDIX M

the aforementioned riders at the City's expense.

Retirees who served more than ten (10) years but less than twenty (20) years on the Department and who retired April 1, 1986, shall receive the same health insurance coverage provided to all active policemen. Should a retiree other than a disability retiree, be eligible for health insurance as a result of other employment, the City will only be responsible to furnish excess coverage so that said retiree will have equivalent coverage as that offered by the City.

Retirees who serve more than ten (10) years but less than twenty (20) years in the Department and who retired after July 1, 1987, shall receive the same health insurance coverage provided to all active policemen; provided however, that the cost of the health

APPENDIX M

insurance shall be shared by both the City and the retiree on the basis of the following:

YEARS OF SERVICE	CITY SHARE OF OF PREMIUM	RETIREE SHARE OF PREMIUM
10	50%	50%
11	55	45
12	60	40
13	65	35
14	70	30
15	75	25
16	80	20
17	85	15
18	90	10
19	95	5
20	100	0

b) Dental Insurance. Family dental insurance coverage shall be provided by the City of Newport to policemen except in the case of unmarried policemen who shall be provided

APPENDIX M

individual coverage. Coverage shall be the Delta Dental Plan of Rhode Island, Level One, Two, Three and Four.

c) Life Insurance. Effective July 1, 1986, the City shall pay for life insurance in the amount of Twenty-Five Thousand ($25,000) Dollars on the life of each retired member covered by this Agreement, or the equivalent. The City will absorb as its cost any rate increase effective July 1, 1986 or thereafter. Effective July 1, 1988, the City shall pay for life insurance in the amount of Fifty Thousand ($50,000) Dollars on the life of each active member covered by this Agreement. The City will absorb as its cost any rate increase effective July 1, 1992 or thereafter.

d) Alternative Health Care. The Union agrees to reopen Article II in the event the City identifies comparable

alternative health coverage. However, no change from Blue Cross/Blue Shield and Delta Dental to other companies shall be initiated without the agreement in writing of the Union.

e) Surviving Spouses. The surviving spouses of all retired police officers, whether the date of retirement was before or after the date of this agreement, shall be eligible through the City at the group rate, to purchase at their own expense the same health insurance coverage that was available to their spouses pursuant to this agreement or its predecessor agreement.

ARTICLE 12. SPECIAL DETAILS

The pay for special details shall be one and one-half (1 1/2) times the rate of pay being paid to patrolmen at the highest salary step (Step D) with a four (4) hour minimum.

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ARTICLE 13. PROMOTIONAL SYSTEM

a) Promotions to positions covered by this Agreement shall be governed by the terms of Title 10 of the ordinance of the City of Newport, except as otherwise provided herein.

b) Any examinations to establish the eligibility for a promotion shall be structured as follows:

1)	Written examination	-80%
2)	Seniority	-20%
		100%

Seniority shall be calculated as follows:

One point (1) for each year of service, and one-half (1/2) of one point for every six months of service, to a maximum of twenty (20) points.

c) The Chief of Police shall fill each vacancy in rank from among the next three officers on the eligibility list;

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provided however, that if he selects an officer other than the first officer on the list, he must state in writing, prior to filling said vacancy, his reasons for passing over said officer or officers.

d) Whenever an eligibility list is reduced to two (2) names by appointment, the list shall be abolished and a new list shall be established; provided, however, that no appointments are available to be made at the time such eligibility list is reduced to two (2) names.

e) Examinations for promotion shall be given every two (2) years; provided, however, that if a promotional list expires prior to the expiration of that two-year period, a new examination shall be scheduled in accordance with Subsection C herein and thereafter the two-year period shall run from the date

APPENDIX M

of the establishment of a new list. When a list is abolished, any officer whose name appeared on that list shall be required to retake the examination to determine eligibility for the new list. He shall receive no priority on account of his former eligibility. No member of the union is eligible to take a promotional examination until he has served at least five (5) years as a member of the Department.

f) The City shall at all times maintain promotional lists for all positions required either by ordinance or by this Agreement. Vacancies in said positions shall be filled within fourteen (14) days after said vacancy occurs or within ninety (90) days if no promotional list is in existence at the time of said vacancy.

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ARTICLE 14. DISCIPLINARY ACTION

a) Disciplinary action against any permanent policeman covered by this Agreement shall be in accordance with the Rhode Island Law Enforcement Officers' Bill of Rights.

b) Interrogation or hearing upon departmental charges shall be conducted pursuant to the disciplinary sections of the Classified Civil Service Merit Ordinance of the City of Newport, as amended, and pursuant to the Rules and Regulations of the Newport Police Department.

c) A policeman against whom departmental charges have been preferred shall have the right to counsel of his own choice, at his own expense, at any interrogation or hearing.

d) A policeman who becomes a suspect in a criminal investigation or

who is arrested on a criminal complaint or charge, shall be afforded all the constitutional rights and privileges appertaining to such proceedings or arrest.

ARTICLE 15. LONGEVITY

a) Effective July 1, 1977, each permanent member of the Newport Police Department covered by this Agreement shall be entitled to longevity payments after he or she has completed the fifth year of service as a member of said department. Payments for longevity shall be considered a part of a member's salary for retirement, pension and all other legal purposes under this contract with the exception that said longevity payments shall not apply to any pension benefits payable to any member or retiree prior to July 1, 1976.

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YEARS OF SERVICE Completed Increments	LONGEVITY	YEARS OF SERVICE Completed Increments	LONGEVITY
5	2.0	17	6.5
6	2.0	18	7.0
7	2.0	19	7.5
8	2.0	20	8.0
9	2.0	21	8.5
10	3.0	22	9.0
11	3.5	23	9.5
12	4.0	24	10.0
13	4.5	Over 24	10.0
14	5.0		
15	5.5		
16	6.0		

b) Effective July 1, 1987, each permanent member of the Newport Police Department covered by this Agreement shall be entitled to longevity payments after he or she has completed the third year of service as a member of said

APPENDIX M

department. Payments for longevity shall be considered a part of a member's salary for retirement, pension and all other legal purposes under this contract and longevity payments computed in accordance with the following schedule shall apply to any pension benefits payable to any member retiring after July 1, 1987.

YEARS OF SERVICE Completed Increments	LONGEVITY	YEARS OF SERVICE Completed Increments	LONGEVITY
3	1.5		
4	2.0		
5	2.5	17	8.5
6	3.0	18	9.0
7	3.5	19	9.5
8	4.0	20	10.0
9	4.5	21	10.5
10	5.0	22	11.0
11	5.5	23	11.5
12	6.0	24	12.0

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13	6.5	Over 24	12.0
14	7.0		
15	7.5		
16	8.0		

ARTICLE 16. UNIFORM ALLOWANCE

a) The City shall pay to each policeman, on or before July 20th of each year a uniform allowance of Seven Hundred and Five ($750.00) Dollars.

b) The City shall supply a helmet to each policeman who is not now supplied with a helmet.

c) The City shall supply handcuffs, a gunholster, a leather belt, a handcuff case and a pocket stick to all new policemen. The City shall replace these items for all policemen if said item is worn out in the line of duty and turned in to the City.

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ARTICLE 17. GRIEVANCE PROCEDURE AND ARBITRATION

a) The purpose of the grievance procedure shall be to settle employee grievances arising out of the interpretation and application of this Agreement on as low a level as possible and as quickly as possible to insure efficiency and high departmental morale.

Step 1. The policeman or policemen involved with or without a Lodge No. 8 Representative, shall submit the grievance to the Chief of Police within ten (10) working days of the date of occurrence. The grievance shall be in writing and shall be signed by the aggrieved party. The Chief shall give his written answer with a reasonable time period.

Step 2. If the grievance is not resolved in Step 1, it may be submitted

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to the City Manager within ten (10) working days of the decision of the Chief. The City Manager shall give his written answer within a reasonable period of time.

Step 3. If the grievance is not resolved in Step 2, it may be submitted to arbitration by either party upon written notice to the other within ten (10) working days of the decision of the City Manager. The arbitration will be held under the Voluntary Arbitration Rules of the American Arbitration Association, or the arbitration will be held and conducted by an arbitrator agreed upon by both the City and the Union, and the decision of the arbitrator shall be final and binding. The expense incident to the arbitration shall be borne equally by the parties. The arbitrator shall have no power to add to,

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delete from, or modify any of the terms or provisions of this Agreement. No grievance shall be filed without prior notification or simultaneous notifications to the Fraternal Order of Police, Lodge No. 8.

ARTICLE 18. PENSIONS

a) The Newport Police Pension System is hereby amended as follows:

(1) The annual pension of any permanent member of the Police Department of the City who retired after June 2, 1947, and before October 10, 1975, after serving twenty-five (25) years on the department, is established at fifty (50%) percent of the regular annual salary for the position from which he retired, as the salary for said position is determined at the beginning of each fiscal year, excluding any longevity increment.

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(2) On or after October 10, 1975 any permanent member of the department shall be and is eligible for retirement after twenty (20) years of service and shall receive as his annual pension fifty (50%) percent for twenty (20) years service plus two (2%) percent per year, but not to exceed sixty (60%) percent, for each additional year served over twenty (20) years, of the annual salary for said position is determined at the beginning of each fiscal year including the additional longevity increment earned by said member within the limits as set forth in the police contract at the time of his retirement.

(3) Any City of Newport Police Chief, Deputy Chief or Assistant Chief, who retired prior to December 31, 1967, and who at the time of his retirement was a member of Lodge No. 8 of the Fraternal

APPENDIX M

Order of Police shall be entitled to an annual percentage increase to his pension equal to the percentage wage increase awarded to active members of the Police Department; said increases to be made at the commencement of each fiscal year.

(4) Any City of Newport police chief who retired subsequent to January 1, 1968, shall be entitled to an annual percentage increase to his pension equal to the wage increase, if any, awarded to active members of the Police Department under the provisions of the police contract.

(5) Provided further that members of the Department who have served in excess of twenty-five (25) years after August 31, 1966, shall receive additional compensation of One Hundred ($100.00) Dollars per year for each year of service beyond twenty-five (25) years, the total

increment in no case to exceed One Thousand ($1,000) Dollars.

(6) All permanent members shall be vested in the pension system after completing ten (10) years in the Department. Permanent members who terminate employment before completion of ten (10) years of service shall receive a refund of their pension contributions with five and one-half (5 1/2%) percent per annum interest.

(7) Permanent members who terminate after completing ten (10) years but before completing twenty (20) years of service shall be fully vested in the pension system. Said members shall receive as a pension two and one-half (2 1/2%) percent of the salary in effect at the time of the employee's service break for each completed year of service on the Department, including probationary time.

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Said member shall be allowed to collect his pension following the first day he or she would have completed twenty (20) years of service on the Department. Said pension benefit shall be subject to an annual escalator adjustment of three (3%) percent per annum.

(8) Notwithstanding the provisions of subparagraph (7), effective July 1, 1977, permanent members who became totally and permanently disabled from any cause after the completion of seven (7) years of service shall receive a yearly benefit equal to fifty (50%) percent of said member's annual salary at the time of disablement.

b. Contributions. Effective October 10, 1975, each member of the Department shall contribute eight (8%) percent of his regular annual salary to the Pension Plan. Any members of the

APPENDIX M

Department who had completed twenty-five (25) years of service prior to March 1, 1986, shall be exempt from said contribution. The remaining costs shall be paid by the City of Newport.

c. Military Service. In computing the minimum service requirements for retirement eligibility, no credit shall be given for military service.

d. Existing Provisions. All other provisions of the existing Pension Plan shall continue in full force and effect.

ARTICLE 19. REIMBURSEMENT FOR EDUCATION

a) The City will pay for approved Law Enforcement courses taken at the time of registration. Said payment by the City will include all mandatory fees imposed by the school as a condition of receiving credit for the course and/or as

a graduation requirement. Should a policeman fail to satisfactorily complete said course, the policeman agrees to reimburse the City for said costs with the reimbursement being made by a single withholding from the policeman's paycheck.

b) Members of the bargaining unit shall be available to attend training, indoctrination, retraining, and briefing sessions for the purpose of improving operational efficiency of the Department, introducing new or improved methods of operation, or other related functions associated to the operation of the Department as determined by the Chief of Police. Such sessions shall be posted, and affected members shall be either verbally, or in writing, notified at least five (5) full days in advance, except under emergency or time restricted

circumstances. Members of the bargaining unit will be obligated for up to two hours per month, or twenty-four hours per year. The City shall be obligated to provide necessary training tools and materials, and instructors, consultants, or trainers to administer and teach department personnel. The City shall pay the members for any time spent in these endeavors at the rate of pay, whether regular time or overtime, they are entitled to under the wage provisions of the contract.

ARTICLE 20.

COMPREHENSIVE PROFESSIONAL LIABILITY INSURANCE

a) The City of Newport shall, on or before October 15, 1975, obtain and pay for "Law Enforcement Officers Comprehensive Professional Liability Insurance" for each permanent member of

the Newport Police Department. Such insurance coverage shall be the equivalent of the coverage offered by Appalachian Insurance Company of Providence in the amount of One Million ($1,000,000) Dollars for each insured and One Million ($1,000,000) Dollars with respect to any one occurrence.

b) The City of Newport shall supply to Lodge No. 8 a copy of the above insurance policy on or before the 20th day of July of each year.

ARTICLE 21. MINIMUM STAFFING

At all times, the City will maintain a minimum of eighty-one (81) uniformed police officers on the Department, excluding the Chief of Police.

Whenever a vacancy occurs in the Department, the City will make immediate application to the Municipal Police Training Academy to send a police officer

candidate whose name appears on the eligibility list to the next class of said Academy. That applicant will be employed by the City as a temporary probational officer from the date of his or her enrollment in the Academy.

Vacancies will be deemed to occur as of the date the City is notified in writing of the retirement or resignation of any police officer or as of the date of discharge of an officer.

ARTICLE 22. HOLIDAYS

a) Holidays

The following holidays shall be paid holidays for all policemen:

- New Year's Day (January 1st)
- Martin Luther King Day (Third Monday of January
- Washington's Birthday (Third Monday of February
- Rhode Island Independence Day (May 4th)

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- Memorial Day (Last Monday of May)
- Independence Day (July 4th)
- V.J. Day (Second Monday of August)
- Labor Day (First Monday of September)
- Columbus Day (Second Monday of October)
- Armistice Day (November 11th)
- Thanksgiving Day (Fourth Thursday of November)
- Christmas Day (December 25th)

If Victory Day, commonly known as V.J. Day, is abolished by an Act of the General Assembly or by the City Council of Newport, then members of the Police Department of the City of Newport will still receive the second Monday of August as a paid holiday.

Holiday pay shall be one-fifth (1/5) of a policeman's weekly salary; and, said holiday pay shall be paid whether or not such policeman works on the holiday.

b) Stress Abatement Day

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In addition to all other days off provided for in this contract and/or in the ordinances of the City of Newport, each police officer shall be entitled to one day off with pay per contract year for the purpose of abating the stress which is uniquely inherent in law enforcement work. The day to be taken shall be at the police officer's discretion, provided however, that the Department is afforded twenty-four (24) hours notice of his/her intent to utilize the day. No more than one officer shall be off per shift without the consent of the Police Chief.

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ARTICLE 23. DURATION OF AGREEMENT

It is agreed that the terms of this Agreement shall remain in full force and effect and to be binding upon both parties hereto commencing July 1, 1988, and terminating June 30, 1989.

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IN WITNESS WHEREOF, the CITY OF NEWPORT, acting by and through its Mayor hereunto duly authorized by resolution of the City Council, and Lodge No. 8, FRATERNAL ORDER OF POLICE, acting by and through its President, hereunto duly authorized, have set their hands and seals on the month, day and year first written above.

In presence of:

CITY OF NEWPORT

_____

_____
Robert J. McKenna,
Mayor

FOP LODGE NO. 8
FRATERNAL ORDER OF
POLICE

_____

_____
John Sperling,
President

APPROVED: _____
Joseph J. Nicholson, Jr.
City Solicitor
City of Newport

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JFF:SJT 5885 F28 SUPERIOR COURT

COUNTY OF NEWPORT

DENNIS DIPINTO

VS. NC89/0327

FRANK EDWARDS, individually and in his capacity as Newport City Manager and STEVEN D. WEAVER, individually and in his capacity as Newport Police Chief and Captain and JOSEPH SUBIAN, in capacity as acting Chief of Newport Police Department

COMPLAINT

JURISDICTION

1. This action arises under the fourteenth Amendment of the Constitution of the United States and under 42 USC Section 1983 and 1988.

2. Jurisdiction is properly vested in this Honorable Superior Court pursuant to the R.I.G.L. Section 8-2-13; Rule 65 of the Rhode Island Rules of Civil Procedure; and Title 42 Chapter 28.6 of the R.I.G.L. (Law Enforcement Officer's Bill of Rights).

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PARTIES

3. The plaintiff, Dennis DiPinto, at all times material hereto, was a resident of the State of Rhode island, a patrolman with the Newport Police department, and a "law enforcement officer" as defined under Section 42-28.6-1(A) of the Rhode Island General Laws.

4. The defendant, Frank Edwards, is a resident of the State of Rhode Island, and at all times material hereto, was the City Manager of the City of Newport. He is sued individually and in his capacity as City Manager.

5. The defendant, Steven D. Weaver, is a resident of the State of Rhode Island, and at all times material hereto, was the Chief of the Newport Police Department. He is sued individually and in his capacity as Chief.

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6. The defendant, Joseph Subian, is, on information and belief, acting Chief while Chief Weaver is on vacation. He is sued solely in his capacity as acting Chief.

COUNT I

7. On or about September 2, 1986, the plaintiff, Dennis DiPinto, was sworn in as a probationary patrolman for the Town of Hopkinton.

8. Between September 2, 1986 and December 5, 1986, the plaintiff attended the so-called Rhode Island Municipal Police Training Academy. The plaintiff graduated from the Rhode Island Municipal Police Training Academy on December 5, 1986.

9. On or about September 2, 1987, the plaintiff completed his one year probationary period as a patrolman with the Hopkinton Police Department.

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10. In May of 1988, the plaintiff applied for the position of patrolman with the City of Newport.

11. On or about August 19, 1988, the plaintiff was advised that he had been accepted as a police officer with the City of Newport.

12. Between the date he applied for the position of police officer with the City of Newport and the date of his acceptance; the plaintiff had been advise that he would be a "lateral transfer" and that he would not have to take the usual psychological examination required of new candidates of the Newport Police Department; nor would he be required to undergo a medical examination normally required of new candidates of the Newport Police Department; nor would he be required to attend the Rhode Island Municipal Police Training Academy as is

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required of new candidates of the Newport Police Department.

13. ^On or about August 26, 1988, the plaintiff, Dennis DiPinto, was sworn in as a full-time law enforcement officer for the City of Newport. His first tour of duty was August 29, 1988.

14. As he had been advised, the plaintiff did not undergo any psychological examination or medical examination nor was he required to attend the Rhode Island Municipal Police Training Academy.

15. The plaintiff served as a full-time law enforcement officer for the City of Newport from August 26, 1988 until June 28, 1989.

16. On June 28, 1989, the plaintiff received a notice dated June 26, 1989, from the defendant, Edwards, indicating that he was to be terminated forthwith.

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A copy of said termination notice is attached hereto and made a part hereof as Exhibit A.

17. In the termination notice, the defendant Edwards indicated that the defendant Weaver recommended such termination and that the defendant Edwards concurred with that recommendation.

18. Section 42-28.6-4 of the R.I.G.L., provides in part as follows:

> If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, transfer, dismissal, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, before taking such action, the law enforcement agency shall give notice to the law enforcement officer that he or she is entitled to a

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> hearing on the issues by a hearing committee....(emphasis added).

19. Plaintiff was neither notified nor given a hearing on the issues by a hearing committee prior to the termination letter of the defendant Edwards.

20. The defendants in terminating the plaintiff, prior to a hearing on the issues by a hearing committee, have violated the specific provisions of Section 42-28.6-4.

21. The plaintiff DiPinto will be irreparably harmed by the defendant's action in dismissing him prior to a hearing under the Bill of Rights in that, if said dismissal is permitted to stand then (a) DiPinto will sustain a loss of salary for a substantial period of time, which will result in other damages which

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could not readily be calculated; (b) DiPinto, even if eventually re-instated, will lose seniority benefits under the collective bargaining agreement between the City of Newport and the Newport FOP; (c) DiPinto will lose fringe benefits under the collective bargaining agreement which could never be recovered; (d) DiPinto will lose his right to a hearing under the Bill of Rights; (e) DiPinto will otherwise be damnified.

COUNT II

Plaintiff, Dennis DiPinto, hereby realleges the allegations set forth in paragraphs 1021 set forth above.

22. The defendants Edwards and Weaver, at all times material hereto, were acting under "color of law".

23. The action of the defendants Edwards and Weaver, was unlawful under the Law Enforcement Officer's Bill of

APPENDIX N

Rights and was in violation of the plaintiff, DiPinto's due process rights under the 14th Amendment of the Constitution and the State General laws.

WHEREFORE, plaintiff prays as follows:

A. That this Honorable Court issue a temporary mandatory injunction, ex parte, compelling the defendants to revoke the letter of dismissal in question, as it applies to the plaintiff, and restore the plaintiff to the position in the Newport City police department that he enjoyed prior to the illegal dismissal until such time that a hearing committee decides what penalty, if any, should be imposed upon the plaintiff for any alleged violation of the rules and regulations of the Newport Police Department.

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B. That this Honorable court after hearing, issue a preliminary and permanent mandatory injunction compelling the defendants to revoke the letter of dismissal in question, as it applies to the plaintiff, and restore the plaintiff to the position in the Newport City Police Department that he enjoyed prior to the illegal dismissal until such time that a hearing committee decides what penalty, if any, should be imposed upon the plaintiff for any alleged violation of the rules and regulations of the Newport Police Department.

C. That this Court award attorneys's fees pursuant to the provisions of 42 USC; Section 1988.

D. That this Court issue such other Orders which it deems just under the circumstances of this case.

By his Attorney

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Joseph F. Penza, Jr., Esquire
OLENN & PENZA
530 Greenwich Avenue
Warwick, RI 02886

I Dennis DiPinto, make affidavit and state that I have read the foregoing complaint and state that all the facts contained herein are true to the best of my knowledge and belief.

Dennis DiPinto

Sworn to before me this 30th day of June, 1989.

Notary Public

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STATE OF RHODE ISLAND
SUPERIOR COURT
NEWPORT, SC.

KIERAN CUNNINGHAM

vs.

FRANK EDWARDS, in his capacity as City Manager of the City of Newport, and Steven D. Weaver, in his capacity as Chief of Police of the City of Newport, and CITY OF NEWPORT

COMPLAINT

COUNT I

1. Plaintiff, Kieran Cunningham, is a resident of the City and County of Newport, State of Rhode Island and he is a police officer in the Police Department of the City of Newport.

2. The City of Newport is a municipal corporation situated in the County of Newport, State of Rhode island. Defendant, Frank Edwards, is the City Manager of Newport and Defendant, Steven

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D. weaver, is the Chief of Police of Newport.

3. Plaintiff Cunningham graduated from the Municipal police Training Academy and was sworn in as a police officer on February 28, 1988.

4. Section 276.14 (a) entitled "Appointments" of the Codified Ordinances of the City of Newport states that a newly appointed police officer "shall serve a one-year probationary period after successful graduation from the Municipal Police Training School." During that period, the department can evaluate his performance and either retain or discharge him for cause. At the conclusion of that period, the officer becomes a "regular or "permanent" member of the department. The ordinance does not authorize any extension of the

probationary period beyond the one year term expressly provided for.

5. On February 2, 1989, Defendant Weaver, in his capacity as Chief of Police, acting on behalf of the City, notified the Plaintiff by letter that the City was extending his probationary period for an additional six-month period for an additional six-month period beyond the February 28, 1989 date, when by operation of law it was scheduled to expire. Said letter is attached hereto and marked "Exhibit A".

6. Plaintiff Cunningham objected to such an extension of the probationary period in a letter to Chief Weaver dated February 17, 1989. Said letter is attached hereto and marked "Exhibit B".

7. On June 26, 1989, Defendant Edwards, in his capacity as City Manager, acting on behalf of the City, wrote to

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the Plaintiff informing him that "in accordance with Section 288.06 of the City Code your employment with the City of Newport is hereby terminated." Said letter is attached hereto and marked "Exhibit C". That section of the ordinance specifically limits the Manger's authority to separate an employee from municipal service to "any time during the probationary period."

8. Chapter 42-28.6 of the Rhode Island General Laws entitled "The Law Enforcement Officers' Bill of Rights' provides a process which must be followed prior to the disciplining or discharge of any "permanently employed city or town police officer." Section 42-28.6-4 expressly provides that "before taking such action." the police agency must notify the officer that he is entitled to a hearing before a committee consisting

of three fellow police officers. The officers who is disciplined or discharged is entitled to "receive all ordinary pay and benefits" until such time as the committee adjudicates the case.

9. Officer Cunningham became a permanent employee of the Newport Police Department on February 28, 1989, at the conclusion of his statutorily set one year probationary period. The Defendants acted unlawfully in attempting to extend said probationary period beyond the one-year term.

10. As a permanent employee of the department, Officer Cunningham was entitled to all of the rights set forth in RIGL Chapter 42-28.6. Contrary to the mandates of that statute, the City of Newport and Defendants Edwards and Weaver did not notify officer Cunningham that he

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was entitled to a hearing and terminated his pay and benefits.

11. That aforementioned conduct of the Defendants' violated both the laws of the State of Rhode Island and the ordinances of the city of Newport.

12. Plaintiff cunningham has been irreparably harmed by the unlawful conduct of the Defendants and he has no adequate remedy at law.

WHEREFORE, Plaintiff demands the following relief from this Honorable Court:

1. Declare that Officer Cunningham is entitled to the rights afforded all permanent police officers under RIGL Chapter 42-28.6.

2. Temporarily restrain and permanently enjoin the Defendants from terminating Officer Cunningham as a member of the Newport Police Department

unless and until such termination is authorized by a hearing panel appointed pursuant to RIGL Chapter 42-28.6.

3. Order the City to restore all pay and benefits, which Officer cunningham has been wrongfully denied.

4. Issue such other and further order as this Court deems just.

COUNT II

13. Each of the allegations contained in Count I of this Complaint are incorporated herein as if restated in full.

14. Officer Cunningham is a member of the Fraternal Order of Police, Lodge No. 8, which is the sole and exclusive bargaining agent for "all permanent, uniformed members" of the Newport Police Department.

15. Pursuant to Article I, Section (C) of the collective bargaining

APPENDIX O

agreement between the City and the FOP, Lodge 8, a "permanent employee is one who is defined in Section 272.01 (36) of the City Code, that is, an employee who has completed his designated probationary period."

16. The designated probationary period for a police officer set by ordinance is one year.

17. By Defendants' refusal to recognize Officer Cunningham as "a permanent employee" of the department and to afford him all of the statutory and contractual rights to which a police officer is entitled, the City of Newport is in violation of said collective bargaining agreement.

WHEREFORE, Plaintiff demands the following relief from this Honorable Court:

APPENDIX O

1. Declare that Officer Cunningham, is entitled to the rights afforded all permanent police officers under the statutes of the State of Rhode Island and the contract between the City and the Fraternal Order of Police.

2. Temporarily restrain and permanently enjoin the Defendants from terminating Officer Cunningham as a member of the Newport Police Department unless and until he is afforded all the procedural and substantive rights to which all permanent police officers in the Newport police department are entitled pursuant to statute and contract.

3. Order the City to restore all pay and benefits which Officer Cunningham has been wrongfully denied.

4. Issue such other and further order as this Court deems just.

APPENDIX O

By his attorneys,
CORCORAN, PECKHAM & HAYES

Joseph T. Houlihan
Post Office Box 389
Newport, RI 02840

Jeffrey J. Teitz
Post Office Box 389
Newport, RI 02840

AFFIDAVIT

I, KIERAN CUNNINGHAM, hereby make affidavit and say that all of the allegations set forth herein are true to the best of my knowledge and belief.

KIERAN CUNNINGHAM

Subscribed and sworn to before me this 10th day of August, 1989.

Notary Public

APPENDIX P

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

NEWPORT,Sc. SUPERIOR COURT

KIERAN CUNNINGHAM,
Plaintiff

vs. Case Number NC890410

FRANK EDWARDS, in
his capacity as
City Manager of the
City of Newport,
et al.,
Defendants

DECISION

ISRAEL, J. In this civil action the plaintiff seeks a judgment declaring that he is a regular permanent member of the police department of the City of Newport (hereinafter: "the City"), entitled to all the rights afforded to each police officers under Chapter 28.6 of Title 42 of the General Laws (Law Enforcement Officer's Bill of Rights) (hereinafter: "L.E.O. Bill of Rights"), other pertinent statutes and ordinances, and the contract

APPENDIX P

between the City and the Fraternal Order of Police. He also seeks to enjoin the defendants from terminating his appointment as a law enforcement officer until he has been accorded all the rights to which he is entitled as a permanent member of the police department. In addition, he claims restoration of his back pay and benefits. The defendants are the city manager, the chief of police and the City, itself.

The sequence of events that gave rise to the plaintiff's claim is not disputed, except that the plaintiff insists that his termination was not justified and he disputes the truth of some of the substance of the allegations made against him. The plaintiff was sworn in on February 28, 1988 as a probationary police officer in the City police department after successfully

graduating from the Municipal Police Training School. The pertinent ordinance provides that the plaintiff "shall serve a one-year probationary period." The purpose of the probationary period of employment is said to be "for closely observing the employee's work, for obtaining the most effective adjustment of a new employee to his position and for separating any new employee whose performance does not meet the required standards." The probationary period is described as "an extension of the examining process."

The plaintiff's probation was generally uneventful with ratings in the average or above-average category until the events of January 1989. But for those events, the plaintiff would have been appointed a regular police officer at the end of his one-year probationary

APPENDIX P

period. On January 14, 1989 the plaintiff in the course of his duties had occasion to deal with one Modesto Echevarria. Mr. Echevarria complained to the police department January 19, 1989 that the plaintiff had used excessive force. Lieutenant Alan Rolfe investigated the incident and concluded that the plaintiff had used more force than was reasonable and necessary. The pertinent ordinance provides that "At any time during the probationary period, the City Manager may separate an employee whose performance does not meet the required standards." Further, "The reasons for the removal shall be furnished the employee and confirmed in writing."

The parties do not disagree that at any time from January 19, 1989 until the successful completion of his one-year

APPENDIX P

probationary period the plaintiff could have been fired without application of the L.E.O. Bill of Rights or the collective bargaining agreement between the City and the Fraternal Order of Police. Instead of terminating the plaintiff or otherwise disciplining him, at the instance of the city manager, the chief of police on February 2, 1989 extended the plaintiff's probation for six months from February 28, 1989 to August 28, 1989. On February 17, 1989 the plaintiff communicated in writing with the Chief. The next-to-last two paragraphs state the plaintiff's intent as clearly as can be made out:

> "Knowing that my actions during this incident were not handled properly, I have a strong concern that a six month extension of probation is

APPENDIX P

excessive and not proportionate to the incident. Having not only a significant affect (sic) on me financially, I am worried that this may make me ineligible for any future career opportunities and achievement.

Supporting your position as chief of the department and understanding the need for adherement to rules and guideline and in an ernest (sic) effort to maintain a good rapport and high level of motivation, I respectfully request that you would reconsider the six month extension on my probation."

APPENDIX P

The chief did not respond to the plaintiff's communication, and the plaintiff continued to work as a patrolman after February 28, 1989. A letter of commendation was placed in his file on March 8, 1989. For reasons which are not material to the issues presented in the case, Lt. Rolfe was assigned to observe the plaintiff's performance of duty during April and May of 1989. As a result of Lt. Rolfe's observations the city manager on the recommendations of the chief of police terminated the plaintiff's employment on June 26, 1989. It is undisputed that the plaintiff was accorded none of the procedural and substantive rights delineated in the L.E.O. Bill of Rights. Likewise, he was not granted any of the rights preserved to a permanent police officer under the disciplinary or grievance and arbitration

APPENDIX P

provisions of the collective bargaining agreement between the City and Lodge No. 8, Fraternal Order of Police, then in effect.

The City contends that on June 26, 1989 the plaintiff was still a probationary employee, since the administrative steps to make him a regular, or permanent employee had not been taken. Therefore, it argues, he was not entitled in the protection of the L.E.O. Bill of Rights, which is accorded only to permanently employed police officers. §42-28.6-1(A). It also points out that the provisions of the collective bargaining agreement pertaining to disciplinary action refer only to "any permanent policemen covered by this agreement." It does not appear from the record in this case that the plaintiff ever invoked the grievance and

arbitration provisions of the agreement, although, arguably they were available to him on February 2, 1989 and June 26, 1989.

The plaintiff argues that on June 26, 1989 he was a regular permanent city police officer because he had completed one year of probationary employment and was knowingly continued thereafter in the employ of the city as a police officer. He says that his status changed automatically from probationary to regular employment when he was not removed from his position within one week from the expiration of his one-year probationary period in accordance with the ordinance. It follows unquestionable, says the plaintiff, that he is entitled to all the benefits of the L.E.O. Bill of Rights and the provisions of the collective bargaining agreement.

APPENDIX P

He must be restored to his former position, according to his argument, pending an application of the pertinent provisions of the L.E.O. Bill of Rights.

The defendants counter the plaintiff's argument by reference to same provision of the City's personnel code, which reads as follows:

"276.14 APPOINTMENTS.

(b) The status of the appointment shall not be changed from probationary to regular until a clarification is made by the department director to the City Manager that the employee's services are satisfactory. An employee shall not acquire full status as a regular employee until approved by the City Manager. If, after a period of one week,

APPENDIX P

> the department director does not certify to regular appointment, the employee shall be removed from the position immediately.

The defendants say that, since the chief did not appropriately certify to the city manager that the plaintiff's services were satisfactory, and that, since the city manager did not approve a change of status for the plaintiff, he never attained regular employment.

The plaintiff rebuts the defendants' counter by pointing out that there is no provision in the personnel code for extending the probationary period beyond one year. Hence, he says, the purported extension on February 2, 1989 was unlawful, and justice requires that the defendants treat him as a regular

employee. The defendants response is two-fold. First, they say, the plaintiff consented by implication to the extension or is estopped to deny his acquiescence by voluntarily continuing in his employment knowing that defendants assumed he understood that he was on probationary status. Second, they point out that the provisions of the personnel code for appointment of an employee to permanent status are mandatory and that non-compliance results in a loss of benefits of regular employment to the putative employee.

The defendants are right on both grounds. The plaintiff's letter of February 17, 1989 is ambiguous. He is asking for reconsideration of the decision to extend his probation. His principal objection was to the length of the extension. When he received no

response to his communication before the year was up, he did not advise the defendants that he did not accept the extension and would regard himself as a regular employee as of February 28. This Court finds that by his conduct after February 2, 1989 he implicitly, if not explicitly, accepted the extension of his probation and waived his right to be made a regular employee or fired on or before one week after the expiration of his one-year probationary period. The Court finds that the defendants relied to their detriment on the plaintiff's conduct in continuing in his probationary employment after the end of the year knowing that the defendants regarded him as a probationary employee during the six month extension. Cf. Galucci v. Brindamour, 477 A.2d 617, 618-19 (R.I. 1984). On balance, this Court finds that

APPENDIX P

the public good is better served by permitting public officials to extend probationary periods of public employment for relatively brief periods, with the consent, express or implied, of the employee, if not forbidden by law, to avoid being compelled to make precipitate hire-or-fire decisions in close cases. Nothing in the code forbids such a consensual extension of probation. The Court does not accept the plaintiff's argument that what is not expressly permitted by the code must be forbidden.

Second, the defendants call the courts attention to Southland v. Town Council of South Kingston, 108 R.I. 73, 279 A.2d 441 (1971), which it says is dispositive of the plaintiff's claim. In that case the plaintiff was claiming the benefit of the provisions of G.L. 1956 (1988 Reenactment) §45-20-1.1, which

were held to be available only to regular members of municipal police departments. The plaintiff in that case had been appointed a "provisional" member of the south Kingstown police department on November 28, 1966. As in this case, the term of such "provisional" appointment was for one year. On December 26, 1967, more than one year after his probationary appointment the plaintiff in the Southland case was notified that he would not be made a permanent member of the police department. He continued to serve as a member of the department until 24, 1968, when he was terminated by the town council.

The Supreme Court relied on Section 37 of the ordinance which created a permanent police department in the Town of South Kingstown. That section provided that a probationary police

officer would attain regular status if ordered by the town council or if the chief of police filed a written statement with the town clerk that the appointee was qualified to receive regular appointment. The Court attached "much significance to the language in Sec. 37 in that it requires affirmative action either by the town council or by the chief of police to confer upon a provisional appointee the status of a regular member of the department." 108 R.I. at 742, 279 A.2d, at 444. The Supreme Court did not rely for its holding on the chief's notice to the plaintiff in December 1967, as the plaintiff argues, but rather on the failure of the council or the chief to take the affirmative action required by this ordinance in order to confer the status of permanent membership on the

plaintiff. In this case the chief and the city manager have not taken affirmative action required to change the plaintiff's status. Like Southland he, too, was in a probationary status when he was fired on June 26, 1989. This Court is bound to follow not only the rulings of the Supreme Court, but its reasoning as well. The rationale of the Supreme Court in the Southland case is a binding precedent by the clearest analogy.

The judgment is for the defendants. The plaintiff's claims are denied and dismissed.

APPENDIX Q

STATE OF RHODE ISLAND

AND

PROVIDENCE PLANTATIONS

NEWPORT, Sc. **SUPERIOR COURT**

DENNIS DIPINTO

VS. NC89/0327

FRANK EDWARDS, individually and in his capacity as Newport City Manager and STEVEN D. WEAVER, individually and in his capacity as Newport Police Chief and Captain and JOSEPH SUBIAN, in capacity as acting Chief of Newport Police Department

HEARD BEFORE:

MR. JUSTICE RICHARD J. ISRAEL

DECEMBER 15, 1989

APPEARANCES:

JOSEPH PENZA, Jr., ESQUIRE
FOR THE PLAINTIFF

JOSEPH NICHOLSON, ESQUIRE
FOR THE DEFENDANTS

APPENDIX Q

CERTIFICATION

I, Sandra J. Delaney, hereby certify that the succeeding pages, 1 through 5, inclusive, are a true and accurate transcript of my stenographic notes.

_____

_____

Sandra J.

Delaney

Court Reporter

APPENDIX Q

DECEMBER 15, 1989

MORNING SESSION

THE COURT: The case of Dennis DiPinto vs. Frank Edwards, et al, NC/89-0327 is before the Court for decision. The decision is for the defendant.

The plaintiff in this case has asked for relief under General Law 1956, 1988 Reenactment, Section 42-28.6-1 and the following sections known as the Law Enforcement Officers Bill of Rights. He says that he was dismissed without a hearing procedure required by Sections 42-28.6-4 through 42-28.6-11. And he asks that the Court reinstate him with back pay until and unless he has been heard under these provisions.

He has expressly and in open court disavowed any claim of judicial review under Section 45-20-1.1. So the Court

APPENDIX Q

has not addressed the merits of dismissal in its decision at all.

The Law Enforcement Officers Bill of Rights by its own terms applies only to the permanently emplcyed city or town police officers. The plaintiff has failed to satisfy his burden of proof that he is or was ever a permanently employed police officer of the City of Newport.

Now, it is uncontroverted in this case that the plaintiff was not made a "regular" employee under Section 276.14 of the ordinance of the city. It is clear that no certification was made by the chief of police to the city manager that the plaintiff's services were satisfactory. It is equally clear and undisputed that the city manager did not approve a change of plaintiff's status from temporary employee to regular

APPENDIX Q

employee at any time. It is also clear that such failures to take action are not inadvertent matters of oversight or negligence. The chief of police did not ever certify the plaintiff, because he did not regard his services as satisfactory. The city manager, accordingly, never had an opportunity to approve or disapprove a certification that the services of the plaintiff were satisfactory.

Now, the Court finds, as a matter of law, that the word regular as modifying employee in Section 276.14 of the ordinance is synonymous with the word permanently employed in the Law Enforcement Officers Bill of Rights.

Now, under the rational of the case cited to the Court of Southland vs. Town Council of South Kingstown, 108 R.I. 738, 279 A.2d 441, 1971 this plaintiff would

not be entitled to relief under either the Law Enforcement Officers Bill of Rights or Section 45-20-1-1. The Southland case and the ordinance both prescribe a bright line separation between regular or permanently employed police officers and those who do not enjoy that status. There are no gray areas. There are no shaded areas. The employment and services of full-time regular, permanently employed officers in our cities and towns is too important to have any gray areas or any shaded areas. Either a policeman is permanent, regular and full-time, enjoying all the same shared benefits, or he is not. In this case the approval by the city manager, and the failing of which, the plaintiff cannot have the protection of the status of permanent or regular employees.

APPENDIX Q

The plaintiff argues that the city is estopped to assert that its failure to certify and approve him in accordance with the ordinance denies him the status of permanency, regularity and full-time employment. the Court is not satisfied that the plaintiff has sustained that burden of proof. All of the city's conduct was fully consistent at all times with the plaintiff having enjoyed probationary status rather than full-time, permanent and regular employment.

Now, the Court finds that the plaintiff was subject to a one year probationary period which began with his initial employment as a police officer. A careful study of Section 276.14 of the city ordinance discloses that police officers are specifically expected from the six month probationary period of all other employees of the city. to adopt

any other interpretation of the city's ordinance or collective bargaining agreement would result in a delineation from their requirements. There is nothing in the collective bargaining agreement which demands that provision be defeated or overridden. There is nothing or any suggestion of the ordinance which requires that this clause be read out of the local ordinance.

Now, it is true that the language with reference to police officers says that he or she is required to serve a one year probationary period after successful graduation from a municipal training school. Now, the plaintiff urges that the after clause is a time specification. The Court finds that the after clause of 276.14 is not reference to the time of the beginning of probation but is a condition of the beginning of probation.

APPENDIX Q

In other words, the first year of employment by a policeman in the City of Newport is a probationary year. but that first year and no part of that first year may be counted unless it comes after completion of municipal training academy. It is not the intent of the drafters of this section that wherever a prospective employee may have been during the period of a week or a year or fifty years, but that after he graduated it would be his first year of employment with the city that would be probationary and the first year would not include any time until he or she had completed municipal training academy. The city felt that the public interest in having one full year of observation of a prospective policeman after training academy was too important to be slighted. The six months probationary period suggested by the

plaintiff is attractive. It would seem to be a possible alternative if there was no way through probation services as to employees serving some time for observation. But it is not necessary to find a year's probationary period either from the collective bargaining agreement or from the ordinance. A common sense reading of 276.14 (a) without any strain indicates that the plaintiff began his probationary period with the City of Newport on or about August 26, 1988. so there was no occasion to certify him as having satisfactorily completed his probation or for him to be approved by the city manager.

It is for these reasons that in this case judgement will enter for the defendant, denying and dismissing the plaintiff's complaint. The defendant will present an order for judgement.

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MR. PENZA: Thank you for your consideration, Your Honor.

APPENDIX R

THE CITY OF NEWPORT, RHODE ISLAND 02840

June 26, 1989

Dennis DiPinto
Newport Police Department
120 Broadway
Newport, Rhode Island 02840

Dear Mr. DiPinto:

Your employment status with the City of Newport is currently that of a probationary nature. The intent of a probationary period is to provide the City the opportunity to evaluate an individual's job performance prior to permanent appointment. In order to obtain permanent appointment, an acceptable standard of performance must be achieved.

It is the determination of the Chief of Police that during the probationary period you have not demonstrated a standard of behavior and conduct suitable for a Newport Police Officer. It is his recommendation that you be terminated from employment with the city of Newport, effective this date. After a review of this matter, I concur with his determination.

This assessment does not rest solely on those aspects of your criminal conviction, but on others as well. You received a warning regarding your actions in an abuse of force investigation. In addition, you received a letter of

APPENDIX R

reprimand for failure to adhere to leave regulations. Your continued employment would not be in the best interest of the City. On this basis, in accordance with Section 288.06 of the City Code, your employment with the City of Newport is hereby terminated.

Sincerely,

Frank Edwards
City Manager

FE/bc

cc: Police Chief
City Solicitor
Personnel Director

EXHIBIT A

Newport - America's First Resort

APPENDIX S

"EXHIBIT C"

THE CITY OF NEWPORT, RHODE ISLAND 02840

June 26, 1989

Kiernan G. Cunningham
Newport Police Department
120 Broadway
Newport, Rhode Island 02840

Dear Mr. Cunningham:

As you are aware, your employment status with the Newport Police Department is that of a probationary officer. This was the result of a six-month extension brought about by an earlier inappropriate use of force. Additional violations of department rules and regulations have now occurred during the ensuing time period. These consist of sleeping on duty, unauthorized absence from duty posts, failure to follow orders, falsification of reports and location to Dispatch, as well as untruthfulness in the course of questioning.

The Chief of Police has found your behavior to be both inappropriate and unprofessional. It is his recommendation that you be separated from employment with the City f Newport Police Department effective this date. After a review of this matter, I concur with his determination.

The purpose of a probationary period is to provide the City the opportunity to evaluate an individual's job performance

APPENDIX B

prior to permanent appointment. Your overall job performance has not met acceptable standards. Therefore, your continued employment would not be in the best interest of the City. On this basis, in accordance with Section 288.06 of the City Code your employment with the City of Newport is hereby terminated.

Sincerely,

Frank Edwards
City Manager

FE/bc

cc: Police Chief
City Solicitor
Personnel Director

Newport - America's First Resort

APPENDIX T

June 30, 1989

Fraternal Order of Police
Board of Directors
120 Broadway
Newport, Rhode Island 02840
Attention: Sergeant John Spearling,
President

Dear Sir:

This letter is to request that the Fraternal Order of Police Union assist me in my legal matter with the Newport Police Department as well as the City of Newport. I would like to respectfully request that the union obtain on my behalf, an attorney to assist me in my request for a Bill of Rights hearing, and my being placed back on full time status as a police officer. I personally have lost thousands of dollars in salary due to no overtime, and also have paid a similar amount for my legal fees with reference to my criminal matter.

I believe that there are several important issues that have to be addressed, which not only concern my particular situation, but could effect other officers in the future. I will await your reply.

Respectfully submitted,

_____
Dennis I. DiPinto

DID:ajd

APPENDIX U

City Manager
Mr. Frank Edwards
City of Newport, Rhode Island

June 15, 1989

Dear Mr. Edwards:

I am writing this letter in regards to the incident that I was involved in on March 11, 1989 and the subsequent actions to date. By the time you receive this letter I am sure you will have read the package of statements and investigation by internal affairs including my statement and closing remarks.

I'm sure you understand that his has been a very difficult three months that have not only involved myself and the department, by my family as well. I am very embarrassed by the entire situation and wish it never happened. However, I hope you understand what led up to this incident and how unavoidable and being in the wrong place at the wrong time turned this situation into a very complicated matter. I am fully aware of my responsibilities and ethics of conduct not only on the job but off duty as well. I assure you Mr. Edwards that my conduct was very professional and I had no idea what (specifically the confrontation at the mens room) was happening or was about to happen. I only reacted to what was happening to me and I only tried to defend myself in the midst of a very difficult situation. I hope this never happens to any other officer because I would not want anyone to go through what I have gone through the last three months.

The Chief and City Manager I know have a very difficult decision to make in regards to any discipline to impose in any situation. I can only add that I have appealed this decision (in the opinion of the judge I was only guilty of seeing a

APPENDIX U

person in an establishment that I had previously arrested and I had the obligation to leave) and am totally confidant that I will be exonerated from this. My wish is that yourself and the chief will consider how I was the victim in this situation (as a direct result of the performance of my duties as a police officer) and my years as an officer both here, with the town of Hopkinton and the A.C.I. I have been a hard worker, loyal worker, and conducted myself professionally to the best of my abilities. Everything I have worked for my entire life and the only career I ever wanted to serve was that of a police officer. I am very proud to be here in Newport, which is the reason I left my previous department. My career and my life are in your hands. I hope and pray that yourself and Chief Weaver will understand what happened and at the very least allow me to stay on the job with my reassigned status until I am exonerated within the next several weeks when I can be fully reinstated.

In closing I would just like to again appeal to you and consider my past record and good conduct and also how important your decision will be for my entire future.

Respectfully submitted,

PIM Dennis I. DiPinto #80

APPENDIX V

"EXHIBIT B"

February 17, 1989

To: Chief Steven D. Weaver
From: Officer Kieran G. Cunningham #17

Dear Sir:

This letter is in regards to an incident on Hillside Ave. and Sims Street involving a Mr. Echavarria and myself.

After speaking with you in the presence of Capt. Burns and Capt. Hughes, I now have an understanding of the concerns of the city manager and yourself. Leaving your office I felt we had a very sincere and constructive discussion on the incident in question and the proper way in dealing with similar situations in the future.

Having recently spoken with Lt. Rolfe I was informed that Mr. Echavarria agreed to sign a medical release form for the treatment received at A.V.A. Hospital which he claim was caused by me. Mr. Echavarria has failed to comply with Lt. Rolfe's request in this matter: which leads me to think he was never treated for any injury and used this fabrication to embellish his account of the incident. This along with conflicting and changing statements from what appear to be bias witnesses, I would hope the department would now be influenced to believe that this incident was magnified to a degree to cause an undue alarm to the city manager and yourself in thinking that one of the police officers was out of control.

Knowing that my actions during this incident were not handled properly, I have a strong concern that a six month extension of probation is excessive and not proportionate to the incident.

Having not only a significant affect on me financially, I am worried that this may make be ineligible for any future career opportunities and achievement.

Supporting your position as chief of the department and understanding the need for adherement to rules and guidelines and in an ernest effort to maintain a good rapport and high level of motivation, I respectfully request that you would reconsider the six month extension placed on my probation.

This letter is being submitted through the chain of command for your review.

Sincerely yours,
Officer Kieran G.

Cunningham #17

APPENDIX W

The Newport Daily News
Column - Our View

FIRED OFFICERS GOT THE JUSTICE THEY DESERVED

It is time -- long past time -- for Kiernan Cunningham and Dennis DiPinto to get the message. They are not going to be Newport police officers. Never. No way.

The message has been delivered several times in the past three years, but Cunningham and DiPinto don't seem to understand it.

Newport Police Chief Steven D. Weaver and City Manager Frank Edwards had good cause to fire them in July 1989. The chiefs actions have been upheld in state Superior Court and by the Rhode Island Supreme Court.

APPENDIX W

Cunningham and DiPinto, acting as their own lawyers, tried to continue the fight in federal court but were rebuffed by federal Magistrate Judge Timothy M. Boudewyns who ruled that the ex-cops already have had their day in court "and they are not entitled to another." Boudewyns threw the case out.

Cunningham and DiPinto can appeal again. But maybe they will start to understand. This case should be closed. Indeed, it never should have been opened.

The facts became clear only after the two appealed their firing in court. Citing personnel rules and privacy requirements, city officials had refused to explain why Weaver decided to fire the two rookie police officers. But lawsuits are public and documents filed in court demonstrated beyond doubt that Weaver

acted wisely in removing these two bad apples from the barrel.

Cunningham was fired for sleeping in his police cruiser while on duty, leaving his assigned beat area, giving a false location to a police dispatcher and lying to senior officers who questioned him.

DiPinto was fired after pleading no contest to assaulting a man in a bar in Ashaway. He punched a Westerly man in the face, breaking his jaw.

Newport does not need police officers who sleep on duty and lie about their conduct or officers who have criminal records for assaulting people in bars. Allowing such men to remain police officers would damage the credibility of the entire force, which is composed of hones, hardworking men and women.

APPENDIX W

While it is regrettable that Cunningham and DiPinto have continued their costly and futile challenge in the courts, there is one beneficial result. The court proceedings provided an opportunity for public scrutiny of a situation that otherwise would have remained hidden from taxpayers.

Too often the privacy rights of those who fail to do their jobs are given priority over the rights of taxpayers who pay the bills to know when things go wrong. Privacy laws were never meant to be a coverup for wrongdoing.

Newport is better off without Cunningham and DiPinto as police officers. And the public is better served by being informed why they were fired.

APPENDIX X

The Newport Daily News
Thursday, June 29, 1989
Section C
by M. Catherine Callahan (Daily News staff)

TWO ROOKIE COPS FIRED; POLICE MUM ABOUT REASONS

NEWPORT - Two rookie policemen have been fired following investigations by the Police Department's Internal affairs unit.

Patrolmen Dennis DiPinto, 26, and Keiran Cunningham, 30, were told Wednesday morning that they had been dismissed from the force. Police Chief Steven D. Weaver met with the men individually to notify them that City Manager Frank Edwards had terminated them.

Edwards has refused to discuss the reasons for the firings.

APPENDIX X

"He has nothing to say about personnel matters," secretary barbara Carney said Wednesday afternoon, after Edwards failed to return several phones calls made to his City Hall office.

Weaver began a scheduled vacation after meeting with DiPinto and Cunningham, and was unavailable for comment. Capt. Joseph Subin, who is the acting chief while Weaver is away, said he is unable to discuss the specifics behind the decision to dismiss the two officers.

"They did not complete their probationary periods satisfactorily," Subin said.

Neither DiPinto nor Cunningham could be reached for comment.

DiPinto was found guilty three weeks ago for assaulting an Ashaway man in a

APPENDIX X

Westerly lounge las March. DiPinto - who was off-duty at the time - reportedly got into a fight with Scott A. Sunderland, 23, and punched him in the face, breaking his jaw.

District Court Judge John J. Cappelli found DiPinto quilty after a trial in Washington County earlier this month. DiPinto has appealed the decision, and is seeking a jury trial in Superior Court.

Weaver took DiPinto off the street and assigned him to desk duty immediately after his arrest. He remained on limited duty until his firing Wednesday morning.

Cunningham has been on patrol since he was hired in February 1988. He was a member of one of the department's night shifts before his dismissal.

APPENDIX X

Neither DiPinto nor Cunningham had completed the required probationary period. Normally, that lasts a year.

DiPinto was sworn into the police force last August, and was just more than halfway through probation at the time of his arrest. Cunningham's probation should have ended in February, but it reportedly was extended for six months because several ranking officers were dissatisfied with his performance on the job.

DiPinto served as a Hopkinton police officer before he was hired by the Newport. Cunningham has a pilot's License and served in the Marine Corps.

Sgt. John Sperling, the president of the Newport chapter of the Fraternal Order of police said he learned of the firings when he reported to his shift

APPENDIX X

late Wednesday afternoon. Sperling said he had not spoken to either DiPinto or Cunningham, and did not know if the men planned to fight their dismissals.

"They can request the support of the union," Sperling said. "They're both probationary officers, so there is a question whether they're entitled to a Bill of Rights hearing. It's not a guaranteed thing."

Police officers and staff around the Police Station seemed surprised this morning that Cunningham had been fired. Several said they did not know that he had been the subject of an internal affairs investigation.

The same officers and staff-members said that DiPinto's firing was somewhat expected after his legal troubles in Washington County.

APPENDIX Y

The Newport Daily News
Section A
by M. Catherine Callahan (Daily News staff)

DETAILS OF COP FIRING SURFACE

Rookie accused of using excessive force, sleeping on job

NEWPORT - A Superior Court judge ruled last week that Kieran C. Cunningham could return to work Monday at the Newport Police Department, where he was fired last June for failing to satisfactorily complete his probation as a rookie patrolman.

But on Monday - exactly two months since he was dismissed from the force - Cunningham did not report for duty. He took the day off, using one of the three paid "stress days" Newport police officers are provided in their contract.

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Although city officials have had little to say about Cunningham's firing, he provided some of the reasons behind the decision in documents filed during the first phase of his court battle to regain his job.

A copy of a June 26 letter written by City Manager Frank Edwards to Cunningham indicates the former Marine was fired because he used excessive force, slept on duty, falsified reports and failed to follow orders during the 16 months he was employed by the Police Department.

In addition, Cunningham reportedly was absent from assigned duty posts without permission, and lied about his whereabouts during radio communications with the police dispatcher.

APPENDIX Y

"The chief of police has found your behavior to be both inappropriate and unprofessional" Edwards wrote in the letter of dismissal.

Copies of that letter and a Feb. 2 letter from Police Chief Steven D. Weaver are included in the package filed in Newport Superior Court Friday by attorneys Joseph T. Houlihan and Jeffrey J. Teitz. A day earlier, the lawyers secured a temporary restraining order that forced the city to reinstate Cunningham pending a court hearing on his appeal of the firing.

Superior Court Judge John Bourcier issued the order from Providence, and scheduled a hearing on the matter for Sept. 5.

Capt. Thomas Hughes said Monday that Cunningham, 30 has been assigned to

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administrative duties within the Police Station. He will return neither to street patrol nor to his spot on one of the department's three night shifts, Hughes said.

Cunningham, a pilot, and Dennis DiPinto, 26, a former Hopkinton police officer, were fired after investigations last spring by the Newport Police Department's internal affair is unity. At the time, Edwards and Weaver said only that neither man had satisfactorily completed his year-long probationary term.

Cunningham's probation should have ended Feb. 28. But several weeks earlier, Weaver sent him a letter of reprimand telling him his probation had been extended until Aug. 28.

APPENDIX Y

"On January 19, 1989 a complaint was filed regarding your actions in the handling of a subject on Jan. 4, 1989" the chief's letter begins. "It was alleged that you physically abused a party you were attempting to remove from the Tonomy Hill area. Reportedly you grabbed the subject, threw him to (the) ground and banged the subject against the ground several times. These actions were witnessed by a number of people."

"Subsequent investigation finds sufficient evidence to support the allegation of excessive force. There is no indication that this subject represented any threat to your personal safety."

Weaver wrote that Cunningham had violated several department regulations concerning the use of force. A copy of

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the letter was placed in Cunningham's personnel file.

Cunningham wrote a reply Feb. 17, asking the chief to reconsider the six-month extension. Cunningham claimed that "bias witnesses" had offered "conflicting and changing statements" about the incident that prompted the extension.

"I would hope the department would now be influenced to believe that this incident was magnified to a degree to cause an undue alarm to the city manager and yourself in thinking that one of the police officers was out of control," Cunningham wrote the chief.

"Knowing that my actions during this incident were not handled properly, I have a strong concern that a six month extension of probation is excessive and not proportionate to the incident.

APPENDIX Y

Having not only a significant affect on me financially, I am worried that this may make me ineligible for any future career opportunities and achievement.?

Cunningham reported for duty this morning, but he refused to come to the telephone when called for comment. Through another patrolman, Cunningham told a reporter "to have a nice day" but indicated that he had nothing else to say.

DiPinto sought a temporary restraining order against the city shortly after he was fired. Retired Superior Court Judge James C. Bulman denied the request.

Three weeks before he was fired, DiPinto was convicted of assaulting an Ashaway man in a westerly lounge last

APPENDIX Y

March. DiPinto is appealing that verdict.

In his letter of dismissal, Edwards wrote that the criminal conviction was not the only basis for DiPinto's firing.

"It is the determination of the chief of police that during the probationary period you have not demonstrated a standard of behavior and conduct suitable for a Newport police officer, Edwards wrote.

DiPinto's probation should have ended in August.

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Providence Journal Bulletin
by Karima A. Haynes (Journal-Bulletin Staff Writer)

FIRED POLICE OFFICER SUES OVER LACK OF HEARING

City says patrolman did not make grade in probationary period.

NEWPORT - A former police officer is suing the city, saying he was fired from the police force without a proper hearing.

In a suit filed Wednesday in Newport Superior Court, Dennis DiPinto, 26, charged that City Manager Francis C. Edwards and Chief Steven D. Weaver violated his right to a hearing guaranteed under the Law Enforcement Officers Bill f Rights.

APPENDIX Z

Capt. Joseph Subin, acting chief while Weaver is on vacation, also was named in the suit.

DiPinto, 26, charges in the suit that he will be "irreparably harmed" by the city's action in dismissing him before a hearing.

If the dismissal stands, DiPinto said, he will lose his salary, seniority benefits, fringe benefits and a right to a hearing under the policemen's bill of rights.

DiPinto is seeking temporary and permanent injunctions to revoke the letter of dismissal issued by the city and to be reinstated to permanent duty with the department. He also is seeking attorney's fees.

retired Judge James C. Bulman on Wednesday denied the request for the

APPENDIX Z

injunctions until a committee of police officials convenes to discuss the allegations against DiPinto.

Last March, DiPinto was arrested for assaulting Scott Sunderland, 23, of Hopkinton during an altercation at a Westerly bar. DiPinto was off-duty at the time.

DiPinto was found guilty last month by Washington County District Court Judge John J. Cappelli. He is appealing the conviction and is seeking a jury trial in Newport Superior Court.

After the incident, Weaver reassigned DiPinto from street duty to a desk job, where he worked until he received the termination letter.

DiPinto joined the Newport police on Aug. 26. As a former patrolman for nearly two years, his hiring was

APPENDIX Z

considered a lateral transfer and he was not required to take the usual psychological and medical examinations or attend the Rhode Island Municipal Police Training academy, a requirement of new recruits of the Newport Police Department.

DiPinto was a full-time officer in Newport until he was fired June 26. At the same time, the city also fired Kieran G. Cunningham, 30 who joined the department in February, 1988. Police said neither officer completed his year-long probationary period satisfactorily.

In his termination letter to DiPinto, Edwards wrote: "It is the determination of the Chief of Police that during the probationary period, you have not demonstrated a standard of behavior and conduct suitable for a Newport police

officer ... I concur with his determination."

Edwards also referred to DiPinto's assault conviction in the letter.

"This assessment does not rest solely on those aspects of your criminal conviction, but on others as well," Edwards wrote. "You received a warning regarding your actions in an abuse of force investigation. In addition, you received a letter of reprimand for failure to adhere to leave regulations. Your continued employment would not be in the best interest of the city. On this basis ... your employment with the City of Newport is hereby terminated."

Supreme Court, U.S.
FILED
APR 18 1994
OFFICE OF THE CLERK

No. 93-1329

In The

Supreme Court of the United States

October Term, 1993

DENNIS DiPINTO and KIERAN CUNNINGHAM,

Petitioners,

vs.

JOHN SPERLING, in his capacity as President of Lodge #8 of the Fraternal Order of Police; STEVEN D. WEAVER, in his capacity as Chief of Police; FRANK EDWARDS, in his capacity as City Manager; ROBERT McKENNA, in his capacity as Mayor; and TERESA CROUTU, in her capacity as Personnel Director, all for the City of Newport, Rhode Island,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH J. NICHOLSON, JR.
City Solicitor
City Hall, 43 Broadway
Newport, RI 02840
(401) 846-9600

Attorney for Respondents City of Newport

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4 pp

STATEMENT OF THE CASE

The crux of this matter is the termination of the Petitioners by the City of Newport from employment on June 26, 1989.

Petitioners disputed this termination in separate actions in the Newport County Superior Court, Newport, Rhode Island. Neither petitioner prevailed. Petitioner DiPinto failed to appeal his adverse determination to the Rhode Island Supreme Court. Petitioner Cunningham appealed to the Rhode Island Supreme Court and lost.

Both petitioners filed a subsequent consolidated action in the United States Federal District Court for the District of Rhode Island alleging violations of the collective bargaining agreement and their civil rights (see 42 USC Sec. 1983), arising from the city's failure to afford them a termination hearing.

Their complaint also asserted claims against the Fraternal Order of Police Lodge No. 8. The Rhode Island District Court adopted the recommended decision of a Magistrate Judge, and entered Summary Judgment against the petitioners. The United States Court of Appeals for the First Circuit affirmed.

ARGUMENT

A. Petitioners have misconstrued the doctrine of res judicata.

Petitioners are concerned with, quite naturally, the effect their termination from the City of Newport Police Department has had on their lives. They describe that

effect on page 30 of their petition as a continued defamation and slander of their names and reputations. Petitioners construe this as a post-judgment act; thus, from their perspective, presumably avoiding the doctrine of res judicata. However, the United States Court of Appeals for the First Circuit characterized their complaints as prejudgment complaints which, in fact, they were. Petitioners' concern focuses on local news media descriptions of the circumstances leading up to the respective dismissals. Local newspapers widely publicized the circumstances surrounding the respective petitioners' dismissal, something the City of Newport had no control over.

Petitioners, despite the doctrine of res judicata, simply can't understand why they can't relitigate the circumstances of their dismissal. This fundamental misunderstanding is their problem alone and not respondents'.

B. A Federal Court must accord a state court the same preclusive effect it would receive in the state where it was rendered.

Petitioners, generally, complain about the doctrine of res judicata. Despite this complaint this Court has, on a number of occasions, affirmed that federal courts must accord a state court judgment the same preclusive effect it would receive in the state where it was rendered. *Allen vs. Curry*, 449 US 90, 96 (1983).

CONCLUSION

Petitioners have misconstrued the doctrine of res judicata. This Court has, on a number of occasions, referred to a federal court according a state court judgment the same conclusive effect it will receive in the state where it was rendered. This principle is well-traveled. For the above reasons, this petition should be denied.

Respondents specifically refer the Court to Petitioners' Appendix, in particular, Appendix B – the opinion of the United States Court of Appeals for the First Circuit, dated November 5, 1993, found at page 2a of Petitioners' Petition. Additionally, reference is made to the Recommendation of the Magistrate Judge, dated December 18, 1992, at page 26a. Respondents would also refer to Appendix H – the Brief and Motion for Summary Judgment for the Defendants, City of Newport, found at page 41a, of the appendix.

Dated: April 18, 1994.

Respectfully submitted,

Respondents
City of Newport
By its Attorney,

JOSEPH J. NICHOLSON, JR.
City Solicitor
City Hall, 43 Broadway
Newport, RI 02840
(401) 846-9600

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TO BE REPRINTED

DAW:CAB 93-045

No. 93-1329

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1994

Dennis DiPinto and Kieran Cunningham,

PETITIONERS,

VS.

John Sperling, in his capacity of President of Lodge #8 of the Fraternal Order of Police, Steven Weaver, in his capacity as Chief of Police, Frank Edwards in his capacity as City Manager, Robert McKenna, in his capacity as Mayor, and Teresa Croutu, in her capacity as Personnel Director, all for the City of Newport, Rhode Island.

RESPONDENT

On Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT, JOHN SPERLING, IN HIS CAPACITY OF PRESIDENT OF LODGE #8 OF THE FRATERNAL ORDER OF POLICE'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Donald A. Woodbine
VOGEL, SOULS & WOODBINE
312 South Main Street
Providence, RI 02903
(401) 454-5350
(401) 454-5170 (fax)

BEST AVAILABLE COPY

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QUESTIONS PRESENTED FOR REVIEW

1. Are the petitioners precluded from litigating "fair representation" claims against the respondent, John Sperling, in his capacity as President of Lodge #8 of the Fraternal Order of Police (Union) in the Federal Trial Court, where a final judgment has been rendered previously in the Rhode Island State Superior Court dismissing petitioners' wrongful termination claims?

2. Did the Federal Trial Court correctly find that the petitioners are unable to establish prima facie case of wrongful termination in the Federal Trial Court, in light of the prior judgment rendered in the Rhode Island Superior Court, and petitioners' failure to adduce any facts to show that the Union acted arbitrarily or in bad faith?

TABLE OF AUTHORITIES

1. Kissinger v. United States Postal Service, 801 F.2d 551 (1st Cir. 1986). 5

2. Vaca v. Sipes, 386 U.S. 171 1967 5

STATEMENT OF THE CASE

A. Nature of the Case

The respondent, John Sperling (Union) hereby adopts the brief of the respondent, The City of Newport, et al in its entirety, and the appendices of the petitioners and the respondent, The City of Newport, et al. As will become apparent herein, the petitioners will be unable to establish a prima facie case of "unfair representation" against the Union if the petitioners are barred by res judicata and/or collateral estoppel from establishing that they have "meritorious" claims for wrongful termination against the City of Newport.

The order of the Federal Trial court dated May 18, 1993 from which an unsuccessful appeal was taken to the U.S. Court of Appeals for The First Circuit, accepted the Report and Recommendation of United States Magistrate Judge Timothy M. Boudewyns (filed April 19, 1993) granting summary judgment in favor of respondent, John Sperling (Union). The basis for the report and recommendation is that the petitioners are estopped from raising wrongful termination claims against the City of Newport under the principles of res judicata and collateral estoppel, and thus are unable to establish the elements of an "unfair representation" claim.

B. Statement of Facts

The respondent, John Sperling (Union) hereby adopts the statement of the case of respondent, The City of Newport, et al in its entirety. In addition, the respondent, Union states that both

petitioners were afforded hearings before the Board of Directors of the Union. Each petitioner was provided with a full and fair opportunity to present information to that Board.

The Board of Directors of the Union considered the facts presented by each of the petitioners at their hearings, and analyzed the collective bargaining agreement and the relevant statutes and ordinances as they applied to the facts of each case. The Board voted not to authorize the use of Union funds to support a legal action by petitioner, DiPinto, based upon its conclusion that such a legal action was not warranted and would not succeed. The Board voted to authorize the use of Union funds to support a legal action by the petitioner, Cunningham, based upon it determination that he should be afforded all of the rights of a permanent employee of the Newport Police Department. A civil action was commenced on petitioner, Cunningham's, behalf by the Union in the Rhode Island Superior Court after a full hearing. When Cunningham requested the Union to fund an appeal to the Supreme Court of Rhode Island, the Board again afforded him a hearing before the Union's governing Board. After a full review, the Board declined to authorize further funding on Cunningham's behalf. The respondent, Union refers this Court to the affidavit signed and filed by John Sperling, President of FOP Lodge #8, which was attached to respondent, Union's motion to dismiss or for summary judgment filed in the Trial Court on September 30, 1992.

SUMMARY OF ARGUMENT

The Federal Trial Court decided correctly and the United States Court of Appeals for The First Circuit affirmed that the petitioners are unable to establish a meritorious claim for wrongful termination against the City of Newport in light of the prior State Court judgment dismissing their claims for wrongful termination against the City of Newport. The complaints filed by the petitioners in the State Court sought compensatory damages and reinstatement of their former positions as Newport police officers allegedly denied to them as a result of being wrongfully terminated. The petitioners had a full and fair opportunity to litigate all issues relating to their alleged wrongful termination in the State Court.

The petitioners cannot establish a prima facie claim for "unfair representation" by the respondent Union without establishing that they have meritorious claims against the City of Newport for wrongful termination. Since the petitioners are precluded from establishing such a meritorious claim under the principals of res judicata and collateral estoppel, it is impossible for them to establish one of the essential elements of an "unfair representation" claim.

In its motions to dismiss or for summary judgment, the respondent Union set for the factual basis for its contention that it acted in good faith at all relevant times, and at no time acted

in an arbitrary manner in regard to the claims of the petitioners. An affidavit setting forth the factual basis for the contentions of the Union was filed with the motion to dismiss or for summary judgment. In response to the motion, the petitioners cited no facts tending to show that the Union acted at any time using bad faith or in an arbitrary manner.

ARGUMENT

The respondent Union hereby adopts the legal arguments stated in the brief of respondent, The City of Newport, et al in their entirety. Since the petitioners are unable to establish meritorious claims for wrongful termination against the City of Newport, they are unable to establish a breach of "fair representation" on the part of the Union, as a matter of law. In order to establish a breach of the duty of fair representation on the part of the Union, the petitioners mush show that their claims are meritorious, and that the Union acted in an arbitrary or bad faith manner in processing their grievances, Vaca v. Sipes, 386 U.S. 171 (1967) and Kissinger v. United States Postal Service, 801 F.2d 551 (1st Cir. 1986). The petitioners are unable to establish a meritorious claim for wrongful termination against The City of Newport in the Federal Trial Court. The petitioners attempted to litigate claims in the Federal Trial Court which were raised or could have been raised in the Rhode Island Superior Court. For this reason, the Federal Trial court correctly decided and the Circuit Court correctly affirmed the decision that the petitioners' claims for wrongful termination were barred as a matter of law under the principles of res judicata and collateral estoppel. Since the petitioners are unable to establish a meritorious claim for wrongful termination, they cannot satisfy one of the essential

elements of a "fair representation" claim as enunciated in Vaca and Kissinger.

The petitioners failed to raise any genuine issues of material fact in their responses to the respondent Union's motion to dismiss or for summary judgment. Specifically, the petitioners failed to provide any factual basis for their claims that the respondent Union acted at any time in bad faith or in an arbitrary manner. The Federal Trial Court correctly decided that the petitioners were unable to satisfy these other elements of their "fair representation" claims as a matter of law and the Circuit Court correctly affirmed that decision.

CONCLUSION

The petitioners are precluded from litigating "fair representation" claims against the respondent, John Sperling, in his capacity as President of Lodge #8 of the Fraternal Order of Police, the Federal Trial Court. The prior judgment of the Rhode Island Superior Court dismissing the petitioners' wrongful termination claims with prejudice effectively bars the action which was filed in the Federal Trial Court. Since there has been a prior determination that the petitioners do not have a meritorious wrongful termination claim against the City, they are unable to establish an essential element of an "unfair representation" claim against the respondent, John Sperling, in his capacity of President of Lodge #8 of the Fraternal Order of Police.

In their response to the Union's motion to dismiss or summary judgment, the petitioners failed to adduce any facts to show that the Union acted arbitrarily or in bad faith. For that reason, the petitioners are unable to satisfy the other essential element of an "unfair representation" claim as a matter of law on the pertinent facts and law applicable to this case, the petitioners have failed to establish that there are any special and important reasons why their petition should be granted as required under Rule 13 of the Rules of this Supreme Court.

For the reasons stated above, the respondent, John Sperling, in his capacity of President of Lodge #8 of the Fraternal Order of Police, request that petitioners' petition for a Writ of Certiorari be denied and dismissed.

Respectfully submitted,
John Sperling, in his capacity
of President of Lodge #8 of the
Fraternal Order of Police,
By Its Attorneys,

Donald A. Woodbine
VOGEL, SOULS & WOODBINE
312 South Main Street
Providence, RI 02903
(401) 454-5350
(401) 454-5170 (fax)

TO: Dennis DiPinto, Pro Se
Kieran Cunningham, Pro Se
P.O. Box 7072
Cumberland, RI 02864

Joseph Nicholson, Jr., Esq.
City Solicitor
City of Newport
43 Broadway
Newport, RI 02840

CERTIFICATION

I hereby certify that I mailed a copy of the within to counsel of record and to both said Pro Se Petitioners by depositing the within in a United States Post Office mailbox with first class postage, prepaid, said counsel of record and both Pro Se Petitioners being named above, on April 18, 1994.

Dated: 4/18/94

Subscribed and sworn to before me this 18th day of April, 1994.

Notary Public Carol Blanchard
My commission expires 7/21/95